

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 218 of 2016

BETWEEN:

AMANDA JOYCE THERESE BOW
1ST PLAINTIFF

AND:

AQUAVIEW PTY LIMITED
2ND PLAINTIFF

AND:

DONLON INVESTMENTS LIMITED
3RD PLAINTIFF

AND:

SUSTAINABLE FOREST INDUSTRIES LIMITED
4TH PLAINTIFF

AND:

FEINT INVESTMENTS LIMITED
5TH PLAINTIFF

AND:

MATASAU HOLDINGS LIMITED
6TH PLAINTIFF

AND:

FIJI REVENUE CUSTOMS AUTHORITY
1ST DEFENDANT

AND:

PWT INVESTMENTS LLC
2ND DEFENDANT

AND:

ESTATE OF JOHN WHITNEY WAGNER
3RD DEFENDANT

AND:

ALIZ PACIFIC
4TH DEFENDANT

AND:

DR. NUR BANO ALI
5TH DEFENDANT

AND:

SUSTAINABLE MAHOGANY INDUSTRIES LIMITED
6TH DEFENDANT

AND:

WPI FIJI LIMITED
7TH DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:

Fa & Company for the Plaintiffs
Fiji Revenue & Customs Authority Legal Section for the 1st Defendant
R. Patel Lawyers for the 2nd, 3rd and 6th Defendants
Haniff Tuitoga Lawyers for the 4th and 5th Defendants

Date of Hearing:

By way of Written Submissions

Date of Ruling:

06 September 2024

RULING

01. There are two similar applications before this Court which shall be the subject of this Ruling.
02. Both applications are Summons to Strike Out the Writ of Summons and the Statement of Claim as filed by the Plaintiff. First of these summonses have been filed on behalf of the 4th and 5th Defendants on 24/01/2017 with the supporting affidavit of the 5th Defendant, Dr. Nur Bano Ali sworn on the 23/01/2017. The second summons for striking out has been filed on behalf of the 2nd, 3rd and 6th Defendants on 01/02/2017 with the supporting affidavit of one Lemeki Sevutia, a senior litigation clerk for the solicitors for the 2nd, 3rd and 6th Defendants.
03. It is surprising to note that these interlocutory applications were pending since 2017 till now over for seven years without determination. The reason for this exorbitant delay is largely on the part of the Plaintiff. When these two summonses were filed, 2nd to 6th Defendants were represented by R Patel Lawyers. The Plaintiff had objected to the same on the basis that R Patel Lawyers had represented the 1st, 4th, 5th, and 6th Plaintiffs in this matter previously and had thereby taken over an year to file a summons for the recusal of R Patel Lawyers (filed on 16/02/2018).

04. Solicitors for the 2nd to 6th Plaintiffs then filed their answer to the recusal application on 15/05/2018 and raised the death of the 1st Plaintiff in this matter as a preliminary objection over progressing the matter forward. Both the Plaintiff and the 2nd to 6th Defendants had thereupon taken time till 14/03/2019 to sort out the recusal issue and were awaiting the ‘tax matter’ related to this case to conclude.
05. On 14/03/2019 the current solicitors for the 4th and 5th Defendants filed a Notice of Change of Solicitors. From that time onwards the solicitors for the Plaintiffs took time till 23/11/2020 to file an Ex-parte summons to substitute the deceased 1st Plaintiff. Upon this application being granted by the Court, the Plaintiffs filed an Amended Writ of Summons on 23/12/2020.
06. Solicitors for the Plaintiffs then filed an Affidavit of Isileli Fa, annexing the Affidavit in Opposition, as deposed by the 1st Plaintiff, to the Summons to Strike Out filed on behalf of the 2nd, 3rd, and 6th Defendants. The original of the 1st Plaintiffs Affidavit in Opposition was later filed on 14/01/2022 along with another Affidavit in Opposition to the Summons for Striking Out filed on behalf of the 4th and 5th Defendants.
07. On 28/03/2022 it was revealed in Court that the 3rd Defendant had passed away. It had then taken over 08 months till 16/11/2022 to file a summons by the Plaintiff to substitute the deceased 3rd Defendant. Upon this application being granted, the Plaintiffs then filed a Second Amended Writ of Summons on 10/03/2023.
08. The matter was then further dragged on for filing of written submissions on the two applications for striking out. Only the 2nd, 3rd and 6th Defendants’ written submissions were filed on 31/05/2023.
09. This matter was then mentioned before me for the first time on 04/10/2023 and all other parties were yet to file their written submissions.
10. 4th and 5th Defendants thereafter filed their written submissions on 06/10/2023. Plaintiffs filed their written submissions on 21/06/2024 and the 2nd, 3rd and 6th Defendants filed a responding written submissions on 10/07/2024 and the two summons for striking out was finally fixed for ruling on written submissions with consent of the parties.
11. As per the Statement of Claim (as amended), the 1st Plaintiff (deceased) was a businessman and the director and CEO of the 2nd to 6th Plaintiffs. The 4th to 6th Plaintiffs had merged their business operations and created the ‘Sustainable Group’, the 1st Plaintiff still being the CEO of the group. The said ‘Sustainable Group’ had then entered into an agreement for a joint venture with the 7th Defendant for sale of

Fiji Plantation Mahogany to the United States of America and internationally. The 2nd and 3rd Defendants had at a later stage entered into an agreement with the above joint venture, known as the SMI Joint Venture Agreement. The 6th Defendant company was created through this joint venture agreement. The 4th Defendant had been acting as tax agents for the Plaintiffs and were later the auditors and business advisers for the 6th Defendant.

12. It is further alleged in the Statement of Claim that there were issues that surfaced between the 6th Plaintiff and the 4th and 5th Defendants due to the 4th and 5th Defendants retrospectively qualifying the 6th Plaintiffs accounts for the year ending 2010 without the 6th Plaintiffs knowledge and consent. It is then alleged that before this issue could be resolved, the 1st Defendant with the support of the 2nd to 5th Defendants seized the 3rd Plaintiffs shares in the 6th Defendant company and sold them to the 3rd Defendant through a purported auction at a discounted price.
13. Arising out of the above alleged actions of the Defendants are the Plaintiffs causes of action in this matter. There are four causes of action relied upon by the Plaintiffs in this matter. I shall reproduce the same in this ruling for clarity,

“1st Cause of Action

4.0. *That 1st Defendant had on or about 14th of January 2014 acted unlawfully and in breach of section 28 of the Tax Administration Decree 2009 by selling the 2nd and 3rd Plaintiffs shares in the 6th Defendant to the 2nd and 3rd Defendant at a purported auction at a discounted price.*

(Particulars given in the SOC and it should be noted that the part of the 1st cause of action for the Plaintiffs relies on the particulars that the 1st to 3rd Plaintiffs had no tax liability to the 1st Defendant and the particulars are given under the headings of unlawful conduct and abuse of powers and bad faith by the 1st Defendant)

2nd Cause of Action

5.0. *The 4th and 5th Defendants was (sic) the auditor and accountant to the Plaintiffs since 2008, with no qualifications, as auditor, to the accounts executed. In reliance upon earlier Ernst & Young and other notable firms having prosecuted earlier prior audits, the Board relied upon having audited the records of the 4th, 5th, and 6th Plaintiffs in the period 2008, 2009, 2010, 2011. The audits for all 3 companies were unqualified, complaint and audits disclosed the integrity and robust nature of the position and process adopted.*

5.1. *The 4th and 5th Defendant was also the auditor and business adviser of the 6th Defendant.*

- 5.2 *The 4th and 5th Defendant was at all material times were the auditors for the Plaintiffs prior to being engaged by the 2nd, 3rd and 6th Defendants.*
- 5.3 *That by virtue of its position as auditor to the Plaintiffs and the joint venture, the 4th and 5th Defendants became privy to the confidential data of the Plaintiffs business affairs and that of the joint venture.*
- 5.4 *That the position of trust and confidence held by the 4th and 5th Defendant, the 4th and 5th Defendants became a fiduciary of both the Plaintiffs and the joint venture.*
- 5.5 *That by virtue of its position as a fiduciary, the 4th and 5th Defendant was required to act in both interests of the Plaintiffs and the 6th Defendant and to ensure that it did not place itself in a position of having a conflict of interest.*
- 5.6 *That on or about the 6th of May 2013, the 1st, 2nd, 3rd, 4th, and 5th Defendants wrongfully and with intent to injure the 2nd and 3rd Plaintiffs and to cause loss to them by unlawful means conspired and combined together to defraud the Plaintiffs of their shares in the 6th Defendant and the lawful income, freedom of movement and liberty and access to medical support of the 1st Plaintiff.*
(Particulars given in the SOC)

3rd Cause of Action

- 6.0 *That on or about the 6th of May 2013, the 1st, 2nd, 3rd, 4th, and 5th Defendants engaged in deception and misleading conduct against the Plaintiffs with intent to mislead or deceive them in the course of trade and commerce contrary to section 75 (1) and (2) of Commerce Commission Decree 2010.*
(Particulars given in the SOC)

4th Cause of Action

- 7.0 *That the act of the 1st Defendant in imposing a tax liability on the 1st and 6th Plaintiffs unilaterally in breach of the approval by the Government of Fiji to support the joint venture and no subsequent seizure and sale of the 3rd Defendants (sic) shares in the 6th Defendant to the 2nd Defendant by the 1st Defendant has resulted in the frustration of the joint venture agreement and bringing the obligations therein to an end.*
(Particulars given in the SOC)

14. Accordingly, the Plaintiffs are claiming for the following remedies,

“Remedies

Wherefore claims against the Defendants as follows:

- (i) *A Declaration that 1st Defendant had acted unlawfully in breach of Section 28 of the Tax Administration Decree 2009 in seizing the shares*

of the 2nd and 3rd Plaintiff in the 6th Defendant and selling the same to the 2nd Defendant;

- (ii) An Order that the seizure of the 2nd and 3rd Plaintiffs shares in the 6th Defendant and its subsequent sale to the 2nd and 3rd Defendant by the 1st Defendant on or about the 14th of January 2014 was not an arm's length transaction but a sham and was therefore null and void.*
- (iii) A Declaration that 2nd and 3rd Plaintiffs at all material times did not have any tax liability to the 1st Defendant that warranted the seizure of their personal property by the 1st Defendant and for the subsequent sale of the same to the 2nd and 3rd Defendant;*
- (iv) An Order that the shares of the 2nd and 3rd Plaintiffs seized and sold the 1st Defendant by way of auction on the 14th of January 2016 to the 2nd and 3rd Defendant is null and void and that those shares remain the lawful property of the 2nd and 3rd Plaintiffs.*
- (v) A Declaration that the 1st Defendant had conspired with the 2nd, 3rd and 4th Defendants to unlawfully seize and sell the 2nd and 3rd Plaintiffs shares in the 6th Defendant pursuant to section 28 of the Tax Administration Decree;*
- (vi) A Declaration that the 2nd and 3rd Defendants had willfully and knowingly conspired with the 4th and 5th Defendant and the 1st Defendant to deprive the 2nd and 3rd Plaintiffs off their shares in the 6th Defendant for profit;*
- (vii) A Declaration that the 4th and 5th Defendants had breached their fiduciary obligations to the Plaintiffs in providing assistance and support to the 1st, 2nd and 3rd Defendants to facilitate the unlawful seizure and sale by the 1st Defendant of the 2nd and 3rd Plaintiffs shares in the 6th Defendant to the 2nd Defendants;*
- (viii) An Order that the 2nd Defendant is a Constructive Trustee of the 2nd and 3rd Plaintiffs shares in the 6th Defendant purchased from the 1st Defendant pursuant to a purported auction conducted by the 1st Defendant on the 14th of January 2014*
- (ix) An Order that the 1st Defendant had acted unlawful in imposing a Departure Prohibition Order on the 1st Plaintiff and that the said Order has no force and effect.*

- (x) *An Order that the 1st Defendant remove the Departure Prohibition Order imposed on the 1st Plaintiff forthwith.*
- (xi) *Damages payable to the 1st Plaintiff in the sum of \$1,000,000.00 against the 1st Defendant for unlawfully imposing a Departure Prohibition Order against the 1st Plaintiff preventing him from leaving the country since 2013.*
- (xii) *General Damages against the 1st, 2nd, 3rd, 4th and 5th Defendant in favour of the 1-4th Plaintiffs.*
- (xiii) *Exemplary Damages against the 1st, 2nd, 3rd, 4th and 5th Defendants in the sum of \$10,000,000.00 in favour of the 1st, 2nd, 3rd and 4th Plaintiffs.*
- (xiv) *An injunction against the 2nd and 3rd Defendants, their servants and agents and whosoever and whatsoever from dealings with the assets of the 6th Defendant in any manner or form.*
- (xv) *Costs of this action.*
- (xvi) *Any other relief that this Court may deem just.”*

15. Pursuant to the Summons to Strike Out filed on behalf of 2nd, 3rd, and 6th Defendants and as well for 4th and 5th Defendants, the grounds for the striking out are,

- “(a) For Abuse of Process*
- (b) Res Judicata and Issue Estoppel*

16. The crux of the argument in filing for striking out the Plaintiffs claim on the above grounds stems from the judgment delivered in the case of HBT 08 of 2013 at the Tax Court in Suva. This was a case brought under section 82 of the Tax Administration Decree 2009 by the 6th Plaintiff as the Applicant against the 1st Defendant who is named as the Respondent in the matter. The issue in the matter is in respect to a part of loan provided to the Applicant (6th Plaintiff) which was later converted to an equity of the Applicant. In this matter before the Tax Court, the Applicant (6th Plaintiff) had challenged the Respondent’s (1st Defendant) decision to consider the said equity as a tax liability of the Applicant and its imposition of tax on the same. The Tax Court by its judgment dated 18/11/2016 had dismissed the application for the Applicant and had held that the said amount held as an equity for the Applicant was taxable and thus the Respondents decision to impose the tax liability against the Applicant was correct in law.

17. The 2nd, 3rd, and 6th Defendants and as well the 4th and 5th Defendants therefore claims that as the claim against them by the Plaintiffs was *“based on the allegation that Matasau Holdings Limited [Matasau] did not owe taxes as assessed by FRCA and if*

this proposition was upheld then it would follow that FRCA had no right to sell shares held by the Plaintiffs in the 6th Defendant”.

18. The 2nd, 3rd, and 6th Defendants and as well the 4th and 5th Defendants therefore submits that based on the findings and the decision of the Tax Court in HBT 08 of 2013, the Plaintiffs cause of action against them cannot be sustained any further and that the seizure and sale of the 2nd and 3rd Plaintiffs shares in the 6th Defendant by the 1st Defendant was therefore justified and legal. It is submitted further that the 6th Plaintiff had not appealed the decision of the Tax Court in HBT 08 of 2013 and thus the issues in this matter are now *res judicata* as they now have been decided by a Court of competent jurisdiction.

19. The Plaintiffs position regarding the application for striking out is that the application itself is misconceived. It is submitted for the Plaintiffs that the action in the Tax Court (HBT 08 of 2013) was between the 6th Plaintiff in this case and the 1st Defendant and the decision of the Tax Court has no bearing on the causes of action relied upon by the Plaintiffs in this matter. It is reiterated by the Plaintiffs that the causes of action in this matter do not relate to the issue of the tax liability of the 6th Plaintiff which was the actual issue that was dealt by the Tax Court.

20. I shall now consider the law relating to an application for striking out the claim and or pleadings. Order 18 Rule 18 (1) of the High Court Rules 1988 reads as follows.

Striking out pleadings and indorsements (O.18, r.18)

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

 - (a) it discloses no reasonable cause of action or defence, as the case may be; or*
 - (b) it is scandalous, frivolous or vexatious; or*
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or*
 - (d) it is otherwise an abuse of the process of the court;*

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

 - (2) *No evidence shall be admissible on an application under paragraph (1)(a).*
 - (3) *This rule shall, so far as applicable, apply to an originating summons and a petition as if the*

summons or petition, as the case may be, were a pleading.

21. Master Azhar, in the case of **VERONIKA MEREONI V FIJI ROADS AUTHORITY**: HBC 199/2015 [Ruling; 23/10/2017] has succinctly explained the essence of this Rule in the following words.

“At a glance, this rule gives two basic messages, and both are salutary for the interest of justice and encourage the access to justice which should not be denied by the glib use of summary procedure of pre-emptory striking out. Firstly, the power given under this rule is permissive which is indicated in the word “may” used at the beginning of this rule as opposed to mandatory. It is a “may do” provision contrary to “must do” provision. Secondly, even though the court is satisfied on any of those grounds mentioned in that rule, the proceedings should not necessarily be struck out as the court can, still, order for amendment. In Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3) [1970] Ch. 506, it was held that the power given to strike out any pleading or any part of a pleading under this rule is not mandatory but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea. MARSACK J.A. giving concurring judgment of the Court of Appeal in Attorney General v Halka [1972] FJLawRp 35; [1972] 18 FLR 210 (3 November 1972) held that:

“Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 19 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised”.

22. Pursuant to Order 18 Rule 18 (2), no evidence shall be admissible upon an application under Order 18 Rule 18 (1) (a), to determine if any pleading discloses no reasonable cause of action or defence. No evidence is admissible for this ground for the obvious reason that, the court can conclude absence of a reasonable cause of action or defence merely on the pleadings itself, without any extraneous evidence.
23. Given the discretionary power the Court possesses to strike out under this rule, the Court cannot strike out an action just because it is weak, or the plaintiff is unlikely to succeed, rather it should obviously be unsustainable. His Lordship the Chief Justice A.H.C.T. Gates (as he then was) in Razak v Fiji Sugar Corporation Ltd (supra) held that:

“The power to strike out is a summary power “which should be exercised only in plain and obvious cases”, where the cause of action was “plainly unsustainable”; Drummond-Jackson at p.1101b; A-G of the Duchy of Lancaster v London and NW Railway Company [1892] 3 Ch. 274 at p.277.”

24. I shall now consider when a pleading shall become an abuse of process of the Court. If the action is filed without serious purpose and having no use, but intended to annoy or harass the other party, it is frivolous and vexatious. Roden J in Attorney General v Wentworth (1988) 14 NSWLR 481, said at 491 that:

1. *Proceedings are vexatious if they instituted with the intention of annoying or embarrassing the person against whom they are brought.*
2. *They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.*
3. *They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.*

25. In Halsbury's Laws of England (4th Ed) Vol. 37 explains the abuse of process in para 434 which reads:

"An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show that 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 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."

26. Moreover, I have comprehensively considered the law relating to 'res judicata' and 'issue estoppel' as helpfully outlined by both the counsels for the Plaintiffs and the Defendants in their respective written submissions.

27. However, without committing myself to a tedious exercise of considering the legal scope of the principal of *res judicata* and *issue estoppel*, it is pivotal to the determination of these summonses for striking out to answer the question whether the issues, allegations and/or the causes of action in this matter is directly and/or indirectly the same issues that were dealt by the Tax Court in HBT 08 of 2013.

28. There is no doubt as to the fact that the Applicant (the 6th Plaintiff in this case) in HBT 08 of 2013 was challenging the FRCA's (1st Defendant in this matter) decision to consider a part of a loan converted to an equity of the Applicant to be liable for tax

and thereby imposing tax on the same as against the Applicant in that matter (the 6th Plaintiff in this case).

29. In Court's considered view, the issues and/or allegations in this case as reflected in the causes of action articulated in the Statement of Claim clearly goes beyond the scope of issues in HBT 08 of 2013. The pivotal issue and/or the allegation in this matter is the seizure and sale of the 2nd and 3rd Plaintiffs shares in the 6th Defendant whereas the 2nd and 3rd Defendants, at any given time, had no tax liability towards the 1st Defendant in that respect. All the causes of action against the Defendants in this matter have accrued, as per the Statement of Claim on the above central issue and/or allegation.
30. So far as this matter is concerned, at this stage of the proceedings, the Court has no reason, whatsoever, to find the decision of the Tax Court in HBT 08 of 2013 to have effectively dealt (directly or indirectly) the issues, allegations and/or the causes of action in this matter.
31. Thus, based on the material before this Court and having due regard to the comprehensive written submissions of the parties, it is my considered view that the issues for determination in the current claim do not fall within the definition and/or the scope of '*res judicata*' and/or '*issue estoppel*'.
32. It thus follows that the 2nd, 3rd, and 6th Defendants and the 4th and 5th Defendants argument and/or ground of 'abuse of the process of the Court', is clearly not made out and that both summonses for striking out the claim necessarily fails, as both these summonses for strike out clearly fail to pass the threshold for allowing an application to strike out the Writ of Summons/Statement of Claim pursuant to Order 18 Rule 18 (1) of the High Court Rules 1988.
33. The Court is of the view that there are serious issues between the parties in this matter that need to be decided before a Court of competent jurisdiction by way of a full-blown trial and that such issues by no means being effectively dealt in the case of HBT 08 of 2013.
34. Before I conclude, it is noted that there's an ancillary issue raised by the Plaintiffs by way of an objection to the summons to strike out in respect of the Affidavit in Support of the 2nd, 3rd and 6th Defendants summons to strike out being sworn by a senior litigation clerk of their solicitors. I have purposely avoided to address this issue as a preliminary objection owing to the fact that these summonses to strike out has already consumed over 07 years in these proceedings.

35. It is, however, suffice to say the that the established legal position in Fiji in this regard is, that in contentious applications before the Courts, affidavits sworn by law clerks are not preferred and are strongly discouraged. Solicitors acting on behalf of their clients must give proper attention to this legal position without falling into unwarranted error and creating unnecessary complications in proceedings and must abide by the guidance given by the superior courts in this regard.
36. In consequence, the Court makes the following orders.
1. The Summons to Strike Out as filed by the 4th and 5th Defendants and the 2nd, 3rd, and 6th Defendants respectively on 24/01/2017 and 01/02/2017 are hereby refused and struck out subject to the following orders of the court,
 2. Costs of both these applications to be in the cause.
 3. Plaintiff to file and serve the Summons for Directions within 07 days from today (That is by 18/09/2024).
 4. In failure to comply with above order number (3), the Writ of Summons and the Statement of Claim (as amended) shall be struck out and dismissed subject to a cost of \$ 2000.00 to be paid to each of the Defendants in the matter, as summarily assessed by the Court.



L. K. Wickramasekara,
Acting Master of the High Court.

At Suva,
06/09/2024.