

IN THE HIGH COURT OF FIJI AT SUVA
IN THE CENTRAL DIVISION
CIVIL JURISDICTION

Civil Action No. HBC 191 of 2022

BETWEEN: **VATULELE HOTELS PTE LIMITED**

PLAINTIFF

AND: **HOME FINANCE COMPANY LIMITED**

FIRST DEFENDANT

AND: **ALMANAC INVESTMENT PTE LIMITED**

SECOND DEFENDANT

AND: **REGISTRAR OF TITLES**

THIRD DEFENDANT

Date of Hearing : 1 July 2024
For the Plaintiff : Mr Rokodreu. V (On Instruction from Vijay Naidu Lawyers)
For the First Defendants : Mr Nand. R
For the Second Defendants : Mr Clark. W
For the Third Defendants : Ms. Harikishan. A and Ms Pratap. S
Date of Decision : 15 November 2024
Before : Waqainabete - Levaci, S.L.T.T, Puisne Judge

J U D G E M E N T
(APPLICATION FOR STRIKING OUT)

PART A - BACKGROUND

1. The Second Defendant/Applicant had filed an application seeking to strike out the pleadings.
2. On the day of trial Counsel for the Plaintiff sort for withdrawal of representation on the basis that there was lack of instructions. That despite consistent attempts to contact the Plaintiff, the Plaintiff has failed to instruct nor return calls to his Counsel.
3. With no objections from the Defendants and having considered that there are reasonable grounds, the Court granted the application for withdrawal.
4. Thereafter the Court proceeded to hear the 2nd Defendant/Applicant and the 3rd Defendant on their responses to the application.

Facts

5. In this matter, the Plaintiff's Director Mr Ganendra Mangal Singh (aka Jay Singh) entered into negotiations prior to 4 December 2018 with the First Defendants Director for the sale of the whole property being the land contained within the Native Lease No 28084 and Native Lease 28085 (Head Leases) with an area (for NL. 28084) to 57.527 Hacs and (for NL 28085) 38.005 Hacs totaling 95.5365 Hacs.
6. In negotiations it is alleged that the Director Jay Singh and HFC entered into negotiations and the First Defendant's Director made representations in trade and commerce to the Plaintiff that:
 - (i) The total land of 95.5365 Hacs was available for sale;
 - (ii) Subject to the terms of sale reduced to writing in a Sale and Purchase Agreement to be executed by the Plaintiff as purchaser from the First Defendant.

7. Prior to this Agreement, Trivest International Limited, the previous owner of the said Head Leases, had obtained Mortgage from the 1st Defendant. On defaulting the Mortgage, the 1st Defendant, through Mr Ramesh Patel, had exercised their powers of Sale.
8. On 4 December 2018 a Sale and Purchase Agreement was entered into by the 1st Defendant and the Plaintiff for the sale of the property which they later varied via a Variation Agreement entered into on 3 September 2019.
9. On 5 December 2017, Judgment in Default (In HBC 250 of 2017) was entered against Trivest International Limited by Mr. Ramesh Patel who was acting for Mitch Todd Hagerman (referred to as Mr. Hagerman) and 472 Rosecrans Ave LLC (“472 RA”), the Judgment Creditors.
10. Therefore on 8 March 2019 Mr. Ramesh Patel had obtained a Variation to the Charging Order Absolute (in Civil Action HBC 230 of 2017 which was earlier granted on 10 September 2018 for NL 28084 and NL. 28085) on behalf of Mr. Hagerman and 472RA to include 6 Sub-Leases from the alleged omitted Sub-Leases as partial Leases.
11. On 3 September 2019 an Order was obtained from the late Acting Chief Justice Kamal Kumar (as he was then in HBC 250 of 2017) for the 6 Sub-Leases from the omitted Sub-Leases that were under a Charging Order made Absolute to be sold.
12. The Plaintiff was never informed on or after 3 September 2019 of the conduct of Ramesh Patel and his firm acting for Hagerman and 472RA in obtaining the Orders regarding the subject land.
13. On 10 September 2019 Ramesh Patel forwarded the transfer document with the Application for Consent to Assign 12 Sub-Leases (whilst omitting 29 Sub-Leases) under the two Headleases NL No. 28084 and NL No. 28085 for signature of the Plaintiff.
14. The First Defendant is alleged to have committed a mistake in conveying the land and failing to rectify the mistake through itself or its attorney’s when the Plaintiff agreed to pay the amount of \$10,700,000 plus VAT is the purchase price in the Agreement. The mistake was material.
15. On 22 May 2022 the 29 omitted Sub-Leases were discovered by the Plaintiff who approached the solicitors and vendor to remedy the error.

16. In addition, the Plaintiff had sort to tender for the omitted pieces of Sub-Leases to bring it in order with the totality of the other pieces of land in order to remedy the deficiency in the land.
17. As a result, the First Defendant's solicitors have breached the trust at the detriment of the beneficiary i.e the Plaintiff when the First Defendant thereafter purported to sell the omitted land to the Second Defendant.

Remedies Sort

18. The Defendant sort the following remedies:
 - (i) Orders for the rectification of the transfers made on 30 September 2019 and the Agreement entered on 4 December 2018 and varied on 3 September 2019 to include the omitted Sub-Leases;
 - (ii) A Declaration that the First and Second Defendants were misleading and deceptive contrary to section 74,75 and 79 of the Fiji Commerce Commission Act by:
 - (a) When the First Defendant engaged in misleading and deceptive conduct constituting a future matter and failed to include the Sub-Leases in the claim for rectification;
 - (b) The first and Second Defendants engaged in the said offence by aiding and abetting each other to exclude the omitted land thus depriving the Plaintiff from their contractual right and entitlement in accordance with the Sale and Purchase Agreement.
 - (iii) Seek a declaration that the Sub-Leases referred to in the claim for rectification made in sub-paragraph (1) constituted unconscionable conduct by the Second and Third Defendants when they excluded the Sub-Leases in the Agreement and Sold as well as Transferred the lands to the Second Defendants;
 - (iv) A Declaration that the First Defendant in trade and commerce made false and misleading representations to the Plaintiff to sell the land whilst excluding the omitted lands;

- (v) Order restraining the First And Second Defendants from registering their interest in the said transfer in respect of omitted lands pursuant to section 145 of the Act pending the determination of the Claim and or rectification of the Transfer and Sale and Purchase Agreement as made and varied on 4 December 2018 and 3 September 2019;
- (vi) An Order restraining the Third Defendant from registering the omitted Sub-Leases pending the determination of these proceedings.
- (vii) An Order extending the Caveat No. 918345 registered on 24 May 2022.

PART B: STRIKING OUT APPLICATION

19. The Second Defendant had thereafter filed for Striking out of the pleadings on the following grounds:
- a. Is scandalous, frivolous and vexatious; and
 - b. Is otherwise and abuse of the process of the Court.

PART C: LAW AND ANALYSIS

20. Order 18 Rule 18 (1) of the High Court Rules reads :

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

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

And may 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 in paragraph (1) (a).”

21. In the Supreme Court Practice (1988, Sweet and Maxwell, London, Vol 1) page 314 para 18/19/3 to 18/19/4 and 18/19/15:

“It is only in 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, at page 91 (Mayor, etc, of the City of London -v- Horner (1914) 111 L.T 512 (1952) 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 Ducky of Lancaster -v- L.& N.W.Ry. Co. [1892] 3. Ch. 274, C.A) The summary remedy under this rule is only to be implied in plain and obvious cases when the action is one which cannot succeed or is some way an abuse of the process or the case unarguable (se per Dunkkwerts and Salmon L.JJ.

Where an application to strike out pleadings involves a prolonged and serious argument, the Court should, as a rule decline to proceed with the argument unless it only harbours doubts about the soundness of the pleadings but, in addition, is satisfied that striking out would obviate the necessity for a trial and therefore where the Court is satisfied, even after substantial argument both at first instance and on appeal, the defence does not disclose a reasonable ground of defence, it will order it to be struck out (Williams & Humbert -v- W & H Trademarks (Jersey) Ltd [1986] A.C 368 [1986] 1 ALLER 129; H.L affirming [1985] ALL ER .

“**Frivolous and vexatious** By these words are meant cases which are obviously frivolous or vexatious unsustainable per Lindley LJ - Att.-Gen of Ducky of Lancaster -v- L.& N.W.Ry. Co. [1892] 3. Ch. 274, C.A)

“**Abuse of process of the Court** Confers upon the Court in express terms powers which the Court hitherto exercised under its inherent jurisdiction where there appears to be ‘an abuse of the process of the Court’. This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a vexation or oppression in the process of litigation”

22. The power to exercise this provision is discretionary and not mandatory.
23. In Pacific Islands Air Pte Ltd -v- Simon [2024] FJCA 30; ABU040.2021 (29 February 2024) Jameel JA, Jitoko JA and Clark JA held that:

“[39] In taking the extreme step of **striking out** the Statements of Defence and Counterclaims, the court had to be satisfied that the conduct of the Appellants unequivocally showed that they had deliberately failed to appear in court with the intention of thwarting the proceedings, that they did not intend to diligently pursue their defence and Counterclaim, and their non-appearance was contumelious, leaving the court with no option, but to conclude that the interests of justice required it to exercise its discretion to strike out the Statement of Defence and the Counterclaim and enter Default Judgment However, in this case the court overlooked relevant considerations and sped to a conclusion that was at variance with the relevant facts. Thus, **striking out** the Statements of Defence and Counterclaims and entering Default Judgment against the unwittingly absent Appellants, and the subsequent refusal to set aside a Default Judgment entered in such circumstances, was not a fair exercise of discretion. In the result, the Appeal is allowed.

Conclusions

[40] Whilst the conduct of the Solicitors could be regarded as careless, or even arising out of an unjustified assumption, in fact the absence was due to a genuine and valid reason, and in the absence of an unless order, the **striking out** of the Statements of Defence and Counterclaims and the entering of Default Judgments, was totally disproportionate and highly prejudicial to the parties’ interest. In these circumstances, justice required the Default Judgments should have been set aside promptly. Accordingly, ground 4 of the grounds of appeal is allowed.”

AFFIDAVITS

24. In their supporting Affidavit, the 2nd Defendant/Applicant deposed that the Plaintiff is the leasee of 2 Native Head Leases and 10 Native land Sub-leases acquired by mortgagee sale from the First Defendant.

25. Fiji Plaza gave the highest bid and its tender of \$12.7 million was accepted with an acceptance letter stating the two Head Leases and 10 Native land Sub-Leases and this was also mentioned again in a letter to confirm settlement.
26. The transactions concluded on 15 October 2019 and that Todd Hagerman had also tendered for additional Sub-Leases.
27. On 20 November 2020 the First Defendant obtained Orders for Sale of the 19 sub-leases.
28. A Sale and Purchase Agreement was entered into between Michael Todd Hagerman and First Defendant for purchase of the 19 Sub-Leases and was allowed to nominate another party to assign his interest in the Agreement.
29. On 31 March 2022 another order was obtained by the First Defendant for sale of the properties to Second Defendant.
30. The Second Defendant purchased and was transferred the properties.
31. The First Defendant wrote to Jay Singh on behalf of the Plaintiff on 1 November 2021 inviting him to express his interest to purchase the properties even when it was advertised on 3 December 2021.
32. The Plaintiff tendered was received by the Chief Registrar on 14 December 2021.
33. Mr Todd Hagerman also lodged his tender which was successful resulting in the March 2022 Court Orders.
34. The 2nd Defendant/Applicant deposes the Plaintiff's claim is an abuse of process to engage again in the properties and that the Second Defendant/Applicant would be prejudiced as a bond fide purchaser. The Second Defendant/Applicant is unable to continue with further developments because of the pending application for injunction.
35. No affidavit in opposition was filed by the Plaintiff/Respondents to reply to the Affidavit by the 2nd Defendant/Applicant.

SUBMISSIONS

36. The first ground submitted by the 2nd Defendant/Applicant for striking out of the Writ of Summons of the Plaintiff is that the pleadings has caused inordinate delay. The 2nd Defendant/Applicant submits that the Plaintiff has not taken any other proactive steps after July 2022 after having filed their Writ of Summons as well as an

application for interim injunction. The plaintiffs delay is deliberate and failed to advance the claim consistently despite court directions including responding to the current application demonstrates an abuse of process.

37. For the second ground, the 2nd Defendant/Applicant submits that the Plaintiff's claim is contrary to the pending orders of the High Court finding that the 2nd Defendant/Applicant as a bona fide purchaser.
38. Two orders were made in HBC 17 of 2020 for the purchase of 19 Sub-Leases from the 1st Defendant. The Plaintiffs Claim is an abuse of Court process. The 2nd Defendant/Applicant cited Vinod Patel and Company -v- Rich [2017] FJHC 343; HBC 106.2008S which referred to Barton Henderson Rasen -v- Merrett [1993] 1 Lloyds Rep 540 Saville J held that:

“It is an abuse of the Court's process to issue proceedings with no intention of taking the case any further. In contentious matters the Courts exist for the purpose of determining claims. Therefore, starting a claim with no intention of pursuing is not using the Courts processes for the purposes for which they were designed.”

39. In Vinod Patel -v- Rich (Supra) the Master Sharma. V held that :

“It can be clearly seen from the Court record together with the chronology of events set out hereinabove that the Plaintiff had not taken much interest in the matter to ensure that the matter is moved in an expeditious manner completing the cause of action and the file be allocated to a Judge for deliberation and Ruling once and for all in the interest of all involved. I therefore conclude that the conduct on the part of the Plaintiff rather constituted an Abuse of the Process of this Court.

The Court also noted whilst striking out both applications of **Summary Judgment** and the **Substantive Writ** Action, that the Matter was commenced in 2008 and still remained pending up to the time of the striking out because of the inactivity on the part of the Plaintiff and having no interest whatsoever to bring this matter to its conclusion.”

40. Lastly the 2nd Defendant/Applicant argues the prejudice suffered by the 2nd Defendant/Applicant because of the vexatious application.

41. The 2nd Defendant/Applicant suggests alternatively to consider Order 25 rule 9 of the High Court Rules and have the matter struck out as there are no real efforts by the Plaintiff/Respondent to pursue the matter.
42. The 1st Defendant supported the application by the 2nd Defendant/Applicant seeking to strikeout the matter.

ANALYSIS

43. The Court considered the grounds in light of the current case proceeding before it. The last matter pending before the Lautoka High Court is the application for interim injunction sort by the Plaintiff in July of 2022.
44. However the matter was not dealt with as the parties applied for and was granted transfer of the proceedings to Suva High Court.
45. The proceedings were then re-allocated to the presiding Judge in Suva High Court who later was transferred.
46. However the Judge had made directions pertaining to the injunction application.
47. When the matter proceeded in my Court, there was before me a fresh application for striking out.
48. Counsel for the Plaintiff had also formally applied for withdrawal based on lack of instructions on the Strike Out application.
49. From the court records, the inordinate delay was not caused specifically by the Plaintiff. The Court had transferred the matter to Suva in 2022 and was only listed before the Suva High Court on 11 August 2023, 13 months later from when it was transferred from the Masters Court in Lautoka.
50. Hence the delay was also contributed by factors beyond the control of the parties, more particularly the Plaintiff. From the records of the Court, the Plaintiff was always present in Court when the matter was called up.
51. The court therefore finds the delay in the proceedings was not caused directly by the Plaintiff and therefore not an inordinate delay.

52. The Court also finds that there is a pending application before Court from the Plaintiff pertaining to injunctive reliefs and therefore has not been dealt with. This clearly shows that the Plaintiff has continued to involve themselves in the court proceedings consistently from when they filed their claim.
53. Hence it will be in the best interest of the parties, that the Court issue an Order 29 Rule 5 of the High Court Rules with a returnable date 6 months from today to enable the Plaintiff to show cause why this matter should not be struck out for failing to move the matter forward within 6 months from the date of this Ruling.
54. In this way, the Court will have dealt with the issue of delay in a proper manner.
55. The 2nd Defendant argued that this is an abuse of court process as the preceding High Court Orders recognized the 2nd Defendant/Applicant as bona fide purchaser of the Sub-Leases which were omitted from the transferred pieces of land alleged to have been agreed to be sold by the Defendant to the Plaintiff/Respondent.
56. The preceding Orders are as follows:
 - (i) HBC 250 of 2017 where Judgment by Default was entered for:
 - (a) Mitch Todd Hagerman and 472 Rosecrans Ave LLC against Trivest International Limited and Albert Bertini to pay a liquidated sum for:
 - (i) Repayments for invested capital to date including advances of \$572, 620.00;
 - (ii) Expenses not yet reimbursed [\$115,047.00]
 - (iii) All legal costs [estimated at \$60,000].
 - (b) Sale by Tender of the Sub-Leases.
 - (ii) HBC 17 of 2020 – Ex parte Orders were issued by Severatne. J, on 31st March 2022 for the sale by Tender of Sub Leases.
 - (iii) HBC 20 of 2022 by Justice Severatne registered a Charge in favour of the Plaintiff against 4 of the 19 Sub-leases of Trivest International Limited.

57. In compliance with the Orders in HBC 17 of 2020, these Sub-Leases were later sold and transferred (Consolidated Transfer Dealing No. 920690) to the 2nd Defendant/Applicant for \$1.5 million. These included separate transfer dealings (Dealing No. 90920) NL. Sub-Lease 611809; transfer dealing (Dealing No. 920921) for NL. Sub- Lease 611810; and transfer Dealing (Dealing No. 920922) for NL. Sub-Lease No. 611811.
58. The registration of a Title stops the ejectment of a proprietor from their land in section 42 (1) (d) or (e) and subsection (3) of the Land Transfer Act unless:
- (d) the case of a person deprived of or claiming any estate or interest in land included in any grant or certificate of title of other land by mis-description of that other land, or of its boundaries, as against the proprietor of any estate or interest in the other land, not being a transferee or deriving from or through a transferee thereof bona fide for value;
- (e) the case of a proprietor claiming under an instrument of title prior in date of registration, in any case in which two or more grants or two or more instruments of title, may be registered under the provisions of this Act in respect of the same land, estate or interest.
- (3) Nothing in this Act contained shall be so interpreted as to leave subject to an action of ejectment or for recovery of damages or for deprivation of the estate or interest in respect of which he is registered as proprietor any bona fide purchaser for valuable consideration of any land subject to the provisions of this Act, or any estate or interest therein, on the ground that the proprietor through or under whom he claims was registered as proprietor through fraud or error or has derived from or through a person registered as proprietor through fraud or error; and this whether such fraud or error consists in wrong description of the boundaries or of the parcels of any land or otherwise howsoever.
59. It is clear from the provisions of the Land Transfer Act that the Plaintiff is claiming mis-description of the properties sold to them as per sub-section (d) of the Land Transfer Act.
60. Furthermore the Plaintiff and 2nd Defendant are both claiming to have entitlement to the Title. The 2nd Defendant as bona fide purchaser and the Plaintiff by equitable right as per sub-section (e) of section 42 (1) of the Land Transfer Act.
61. These are trial able issues and unless and until when the Court delivers its final judgment, can the Court then determine who has the better title and what remedies can be awarded to the Plaintiff.

62. I therefore find that the pending claim is not frivolous or vexatious. There are serious issues to be tried and determined at trial by way of evidences.
63. Despite the Plaintiff or their Counsel not appearing, the Court must still exercise its judicial discretion and determine whether the grounds by the 2nd Defendant/Applicant is established.
64. I am not satisfied at this point.
65. The wordings in the Claim are tedious and long winded, however the gist of the Plaintiffs cause of action are issues that are triable.
66. Since the Application for striking out is a summary proceedings, I find that it cannot establish nor allow the court to determine finally the crux of the dispute, and therefore does not lay to rest the triable issues in dispute.
67. I would be amiss for this Court, when balancing case management with proper administration of justice, to adhere to the 2nd Defendant/Applicants application without allowing for the proceedings to take its normal cause bearing in mind that at the end of the day to ensure there is a proper determination of the matters in dispute.
68. It goes without saying that there is a place for such applications as this.
69. However in this proceedings, with the current facts in dispute and given the complexity of the nature of proceedings, that the matters be finally determined in Trial.
70. Therefore the Court will not grant the application.
71. Given that the Plaintiffs/Respondent were not present to argue or to defend themselves, the Court will not award any costs.

ORDERS OF THE COURT

72. The Court orders are as follows:

- (i) **That the Application for Striking out of the Writ of Summons by the 2nd Defendant/Applicant is hereby dismissed;**

- (ii) That there be no Order as to costs.
- (iii) Matter will take its normal course and therefore adjourned for 6 months from today;
- (iv) Order 25 Rule 9 under the High Court Rules for Notice to Show Cause be issued.



A handwritten signature in blue ink, consisting of a large, stylized loop followed by a horizontal line.

Justice Senileba Waqainabete-Levaci

Puisne Judge

15 November 2024