

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 124 of 2024

BETWEEN:

VIMLESH PRAKASH
PLAINTIFF

AND:

IFRAZ ALI
DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:

Parshotam Lawyers for the Plaintiff
Messrs. Maqbool Lawyers for the Defendant

Date of Hearing:

By way of Written Submissions

Date of Ruling:

28th March 2025

RULING

- 01.** The Defendant on 18/11/2024 filed Summons to Strike Out the Writ of Summons and the Statement of Claim filed by the Plaintiff on the 18/04/2024. This Summons has been made pursuant to Order 18 Rule 18 (1) (a) of the High Court Rules 1988, on the ground that the Plaintiff's Statement of Claim discloses no reasonable cause of action, and that the Plaintiff's claim is statute barred.

02. Both parties were directed by the Court to file written submissions regarding this application. Accordingly, the Plaintiff filed its written submissions on 24/12/2024 and in response, the Defendant filed a comprehensive written submission on 06/01/2025.
03. Having considered the written submissions by the parties along with the pleadings in the matter, I now proceed to make my Ruling on the Summons to Strike Out as follows.
04. The Plaintiff's claim is arising out of a business agreement between the Plaintiff and the Defendant for occupying the Defendant's business property (the yard) to 'build and operate' a business from the said premises and in lieu of rent, the Plaintiff was to assist with all accounting matters in the Defendant's business.
05. It is further alleged that sometime after, the relationship between the parties grew sore and the Plaintiff was demanded to leave the said yard. Plaintiff alleges that when he vacated the yard of the Defendant, all the Plaintiff's items that were on the said yard were inventoried, jointly by the Plaintiff and the Defendant and that the Plaintiff only removed some of the movable items whereas the rest was left behind. Defendant had thereafter expressed his intention of buying the remaining items of the Plaintiff, but the same had not eventuated. It is further alleged that although the Plaintiff thereafter attempted to liaise with the Defendant on removing the remaining items, the Defendant had not entertained the Plaintiff in this regard. As such the Plaintiff claims that the Defendant is holding the remaining items of the Plaintiff in a trust.
06. The Plaintiff in its Statement of Claim seeks the following orders,
 - a. *A declaration that Defendant holds the items listed in paragraph 9 herein in trust for the Plaintiff.*
 - b. *An order that the Defendant return the items listed in paragraph 9 herein to the Plaintiff forthwith and the condition and value of such items be determined by a registered valuer appointed by the Chief Registrar.*
 - c. *The Defendant pay damages to the Plaintiff in the sum of \$ 96000.00 less the value of the items as determined by the valuer.*
 - d. *Alternatively, an order that the Defendant pay the Plaintiff the sum of \$ 96000.00 as damages as compensation for the items specified in paragraph 9 herein.*
 - e. *Interest on the judgment sum.*
 - f. *Costs of this action.*
 - g. *Such further and other relief as this Honorable Court considers appropriate.*

- 07.** The Defendant, in its Statement of Defence had denied that the Plaintiff build and operate a business from his property. He had submitted that the business the Plaintiff is referring to was owned by one Mohammed Rafiq and the items claimed by the Plaintiff belongs to the said Mohammed Rafiq and the Defendant's father. Accordingly, the Defendant has prayed in his Statement of Defence for the following orders,
- a. *To strike out the claim as it is out of time (Limitation Act 1971-Part 2 (Sec 4-7) as claim should be within 6 years.*
 - b. *A declaration that the pending items be returned to the owner, Estate of Mohammed Rafiq.*
 - c. *The Plaintiff to pay my solicitors costs and all our running around costs together with all the harassment we have had to go through since 2017.*
 - d. *Any such other relief that this Honourable Court considers just and appropriate.*
- 08.** In its reply to the Statement of Defence, the Plaintiff has denied the allegations that the Plaintiff did not build and operate a business from the Defendants yard and that the items claimed do not belong to the Plaintiff. He has further submitted that the Defendants actions in taking an inventory of the property belonging to the Plaintiff and retaining part of those items has created a constructive trust regarding the retained items. It is alleged by the Plaintiff that this trust was to the effect that the Defendant would hold the Plaintiff's property in trust until such time the Plaintiff removes those items or that the Plaintiff is adequately compensated by the Defendant for these items.
- 09.** There was no affidavit evidence filed in support of the Summons to Strike Out as it was made pursuant to Order 18 Rule 18 (1) (a) of the High Court Rules 1988. However, the Court notes that the Defendant in its written submissions referred to all the alleged evidence on behalf of its case. As the counsel for the Plaintiff has correctly pointed out, this is unacceptable as the written submissions should not consist of evidence which has not been tendered to the Court, in a *viva voce* examination of witnesses and/or by affidavit.
- 10.** The Plaintiff may, with the leave of the Court, tender such evidence by way of an affidavit. However, no such application for leave was made to the Court and no affidavit was filed. As such I shall disregard all evidence referred to in the Defendant's written submissions.
- 11.** In any event, 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.

12. Besides the above evidence, the Defendants submission is that the Plaintiff's claim is regarding an agreement/arrangement allegedly made between the parties in 2017 and pursuant to the Limitation Act Sec. 4 to 7, the Plaintiff should have filed this claim within 06 years. As the Plaintiff filed this claim after that statutory limitation period, the Plaintiff failed to disclose a reasonable cause of action. Therefore, the Defendant moves for the Plaintiff's claim to be struck out subject to costs.
13. The Plaintiff on the other hand has submitted that the Defendant has failed to plead any reliance on the Limitation Act in the Statement of Defence which is a breach of Order 18 Rule 7 of the High Court Rules 1988. The Plaintiff has also submitted that the claim is not time barred pursuant to Sec. 4 of the Limitation Act, since Sec. 4 of the Limitation Act is subjected to Sec. 9 of the Act, which excludes trusts and trust properties from the Limitation Act. Accordingly, the Plaintiff has submitted that there are triable issues in this matter and the Court ought not to strike out the proceedings summarily.
14. I shall now consider the relevant legal provisions and the case authorities in this regard. As per the Summons for Striking Out, the application has been made pursuant to Order 18 Rule 18 (1) (d) on the following grounds.
 - a) That there is no reasonable cause of action against the Defendant
 - b) That the Writ of Summons filed by the Plaintiff is statutory barred by Section 4 of the Limitation Act 1970.
15. 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.*

16. 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 summery 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”.

17. As stated in the foregoing paragraphs of this ruling, 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. His Lordship the Chief Justice A.H.C.T. GATES (as His Lordship then was) in **Razak v Fiji Sugar Corporation Ltd** [2005] FJHC 720; HBC208.1998L (23 February 2005) held that:

“To establish that the pleadings disclose no reasonable cause of action, regard cannot be had to any affidavit material [Order 18 r.18(2)]. It is the allegations in the pleadings alone that are to be examined: Republic of Peru v Peruvian Guano Company (1887) 36 Ch.D 489 at p.498”.

18. Citing several authorities, Halsbury’s Laws of England (4th Edition) in volume 37 at para 18 and page 24, defines the reasonable cause of action as follows:

“A reasonable cause of action means a cause of action with some chance of success, when only the allegations in the statement of case are considered” Drummond-Jackson v British Medical Association [1970] 1 ALL ER 1094 at 1101, [1970] 1 WLR 688 at 696, CA, per Lord Pearson. See also Republic of Peru v Peruvian Guano Co. (1887) 36 ChD 489 at 495 per Chitty J; Hubbuck & Sons Ltd v Wilkinson, Heywood and Clark Ltd [1899] 1 QB 86 at 90,91, CA, per Lindley MR; Hanratty v Lord Butler of Saffron Walden (1971) 115 Sol Jo 386, CA.

19. Given the discretionary power the court possesses to strike out under this rule, it cannot strike out an action for the reasons 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 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.”

20. It was held in **Ratumaiyale v Native Land Trust Board** [2000] FJLawRp 66; [2000] 1 FLR 284 (17 November 2000) that:

“It is clear from the authorities that the Court's jurisdiction to strike out on the grounds of no reasonable cause of action is to be used sparingly and only where a cause of action is obviously unsustainable. It was not enough to argue that a case is weak and unlikely to succeed, it must be shown that no cause of action exists (A-G v Shiu Prasad Halka [1972] 18 FLR 210; Bavadra v Attorney-General [1987] 3 PLR 95. The principles applicable were succinctly dealt by Justice Kirby in London v Commonwealth [No 2] 70 ALJR 541 at 544 - 545. These are worth repeating in full:

1. 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 (General Street Industries Inc v Commissioner for Railways (NSW) [1964] HCA 69; (1964) 112 CLR 125 at 128f; Dyson v Attorney-General [1911] 1 KB 410 at 418).

2. 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 reasonable cause of action (Munnings v Australian Government Solicitor (1994) 68 ALJR 169 at 171f, per Dawson J.) or is advancing a claim that is clearly frivolous or vexatious; (Dey v. Victorian Railways Commissioners [1949] HCA 1;(1949) 78 CLR 62 at 91).

3. An opinion of the Court that a case appears weak and such that it is unlikely to succeed is not alone, sufficient to warrant summary termination. (Coe v The Commonwealth (1979) 53 ALJR 403; (1992) 30 NSWLR 1 at 5-

7). *Even a weak case is entitled to the time of a court. Experience reaches that the concentration of attention, elaborated evidence and argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*

4. *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. (Coe v The Commonwealth(1979) 53 ALJR 403 at 409). 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 so in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.*

5. *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 pleadings. (Church of Scientology v Woodward [1982] HCA 78; (1980) 154 CLR 25 at 79). A question has arisen as to whether O 26 r 18 applies only part of a pleading. (Northern Land Council v The Commonwealth (1986) 161 CLR 1 at 8). However, it is unnecessary in this case to consider that question because the Commonwealth's attack was upon the entirety of Mr. Lindon's statement of claim; and*

6. *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”.*

21. Section 4 of the Limitation Act reads as follows,

[LIM 4] Limitation of Actions of Contract and Tort, and Certain Other Actions

4 (1) *The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say—*

- (a) actions founded on simple contract or on tort;*
- (b) actions to enforce a recognizance;*
- (c) actions to enforce an award, where the submission is not by an instrument under seal;*
- (d) actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture, provided that—*
 - (i) in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any*

Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to 6 years there were substituted a reference to 3 years; and

- (ii) nothing in this subsection shall be taken to refer to any action to which section 6 applies.*
- (2) An action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement of the action.*
- (3) An action upon a specialty shall not be brought after the expiration of 12 years from the date on which the cause of action accrued, provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.*
- (4) An action shall not be brought upon any judgment after the expiration of 12 years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of 6 years from the date on which the interest became due.*
- (5) An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any Act or Imperial enactment shall not be brought after the expiration of 2 years from the date on which the cause of action accrued, provided that for the purposes of this subsection the expression "penalty" shall not include a fine to which any person is liable on conviction of a criminal offence.*
- (6) Subsection (1) shall apply to an action to recover seamen's wages, but save as aforesaid this section shall not apply to any cause of action within the Admiralty jurisdiction of the High Court which is enforceable in rem.*
- (7) This section shall not apply to any claim for specific performance of a contract or for any injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as has, prior to the commencement of this Act, been applied.*

22. Sec. 9 of the Limitation Act reads as follows,

[LIM 9] Limitation of Actions in respect of Trust Property

9 (1) *No period of limitation prescribed by the provisions of this Act shall apply to an action by a beneficiary under a trust, being an action—*

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee, trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his or her use.

(2) Subject as aforesaid and to the provisions of the Trustee Act 1966, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued, provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.

(3) No beneficiary as against whom there would be a good defence under the provisions of this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he or she could have obtained if he or she had brought the action, and this Act had been pleaded in defence.”

23. When considering an application for summary dismissal of proceedings the Court will always have recourse to the principles of a fair trial. The principle of a fair trial requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
24. Courts are therefore vested with the power to strike out any such proceeding or claim which is detrimental to or delays the fair trial. Likewise, the rule of law and the natural justice require that, every person has access to justice and has fundamental right to have their disputes determined by an independent and impartial court or tribunal. The principle of a fair trial is now embodied in the Constitution of Fiji. A fair trial is thus a constitutional right of a litigant in Fiji.
25. Plaintiff's claim is for certain items belonging to him that was left with the Defendant. It is alleged as per the Plaintiff's pleadings that the Defendant is holding onto these items as of a constructive trust formed due to the nature of the dealings between the parties. This is certainly a triable issue between the parties as the Defendant claims that the items in question do not belong to the Plaintiff but has admitted that they were inventoried between the parties when the Plaintiff was directed to leave the Defendant's yard. This issue certainly needs evidence given at a trial to be conclusively decided.
26. The issue of whether the claim is being statute barred pursuant to the Limitation Act is also a triable issue which needs evaluation of evidence at a trial. The associated issues integral to the issue of statutory limitation in this matter would include the question of whether there's, in fact, a constructive trust that exists between the parties? And if so when was such trust created and how would such trust be relevant to deciding the rights of the parties? These are real issues that need to be addressed

through evidence given at a full-blown trial, prior to deciding on the issue of statutory limitations pursuant to section 4 and 9 of the Limitation Act.

27. When the Court detects real issues between the parties, it was held that,

“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”

(as per Dixon J in Dey v. Victorian Railways Commissioners [1949] HCA 1; (1949) 78 CLR 62, 91)

28. In the foregoing paragraphs of this ruling, the Court has already found that there are triable issues between the Plaintiff and the Defendant in this matter. Whereas, the Court accordingly concludes that the Defendant has not been able 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 and that this application should therefore necessarily fail.

29. Consequently, the Court makes the following orders,

1. The Summons to Strike Out as filed by the Defendant on 18/11/2024 is hereby refused and struck out subject to the following orders of the court,
2. Costs of this application to be in the cause.



At Suva,
28/03/2025.

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