

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 142 OF 2023

BETWEEN : **FOREST ENTERPRISE** a private company having its duly
registered office at Lot 1, Nawaicoba, Nadi.

PLAINTIFF

AND : **FIJI PINE LIMITED** of Drasa, Lautoka, Corporate Body.

DEFENDANT

Before : Master P. Prasad

Counsels : Mr. M. Ajmeer and Mr. S. Nand for Plaintiff
Ms. N. Choo for Defendant

RULING

(Strike out)

1. The Plaintiff brings this action against the Defendant for the alleged breach of a Memorandum of Understanding (**MOU**) and fraud.
2. The Plaintiff through its Amended Statement of Claim (**Claim**) states as follows:
 - a. The Plaintiff owns a fleet of equipment.
 - b. The Plaintiff's equipment was hired by the Defendant in April (claim does not specify the year) and the total hiring fees together with overdue balance was \$171,174.51.
 - c. On 26 July 2006 the parties entered into a MOU wherein the Defendant agreed to owing the Plaintiff a sum of \$171,174.51, and agreed to pay a lumpsum of \$40,000.00 and thereafter \$10,000.00 every month until the sum owed was paid in full.
 - d. Further to the MOU, the Defendant also sent a letter of confirmation on 26 July 2006 stating: "*this is to confirm direct deduction of machine hire proceeds from the above (referring to Nasesevia 1 and Kainiyasawa 1) logging gangs at the rate of \$11.34 and payable to M H KHAN of Forest Enterprises*" (**Assurance Letter**).
 - e. The Plaintiff carried out further works in August, September and October 2006 for a total cost of \$44,329.97.
 - f. In August/September the Defendant paid a sum of \$29,576.06.

- g. Defendant then on 26 May 2006 issued two cheques to the Plaintiff for the sums of \$22,852.73 and \$35,959.70 respectively and both cheques were dishonoured.
- h. Since 2006 the Plaintiff has requested for payment from the Defendant for all outstanding dues.
- i. On 10 March 2023, the Defendant responded to the Plaintiff and refused to pay the outstanding dues.
- j. The Defendant breached the MOU and failed to pay \$171,174.51.
- k. The Defendant failed to pay the additional sum of \$14,753.91.
- l. The Defendant has made false promises continuously and not paid despite the MOU and the Assurance Letter.
- m. The Defendant issued the two dishonoured cheques to defraud the Plaintiff.

3. The Plaintiff then claims the following reliefs:

- a. An order for special damages for \$185,929.42.
- b. General damages for breach of MOU and fraudulent misrepresentation.
- c. Exemplary and punitive damages.
- d. Pre and post judgment interest at a rate of 13.5%.
- e. Costs on solicitor client basis.
- f. Other remedies the court deems just including but limited to compensation for loss of income.

4. On 12 September 2023, the Defendant filed a Summons to strike out the Plaintiff's Claim pursuant to Order 3 Rule 3 and Order 18 Rule 18 of the High Court Rules (HCR) and Sections 4(1)(a) and 15 of the Limitation Act 1971 (**Summons**). In support of the Summons the Defendant filed an Affidavit of one Taniela Nakibo, Chairman of the Defendant's Board of Trustees stating the following:

- a. The issue surrounding the claims by the Plaintiff happened in 2004 and 2006.
- b. On 02 February 2010, the Plaintiff wrote to the Defendant's Board seeking assistance for repayment from the Defendant.
- c. The Plaintiff filed the Claim in 2023 which is 13 years from the Plaintiff's last attempt for recovery.
- d. The dealing was made between the Plaintiff and the Defendant's Manager who is now deceased, and the matter is unrecoverable from the archives.
- e. After 17 – 19 years no current employee of the Defendant is aware of the Claim.
- f. The Claim is statute barred and does not satisfy the elements of fraudulent misrepresentation.

- g. For the claim of breach of MOU - the action began in 2006 when the Defendant defaulted in payment and the Claim was filed in 2023 which is statute barred.
 - h. On the claim of fraudulent misrepresentation – the cheques were dishonoured in 2006 and pursuant to section 15 of the Limitation Act 1971, the Claim is statute barred.
 - i. The Defendant also puts the Plaintiff on strict proof of the Assurance Letter sent on 26 July 2006 from the Defendant.
5. The Plaintiff opposed the Summons and filed an Affidavit in Opposition deposed by Mohammed Asad Khan, one of the Directors for the Plaintiff as well as a Supplementary Affidavit in Opposition deposed by both Mohammed Asad Khan and Mohammed Hafiz Khan, as Directors for the Plaintiff stating as follows:
- a. The Plaintiff's Claim satisfies the elements of fraudulent misrepresentation.
 - b. The question of limitation must be determined on evidence and not on a decision based on pleadings alone.
 - c. The Plaintiff's last attempt to recover the debt did not happen 13 years ago but the Defendant has continuously stalled the payment by making verbal and written promises.
 - d. As part of a business relationship, the Plaintiff displayed courtesy to Defendant and granted extended periods to clear the debt.
 - e. It is not unreasonable to give debtors longer repayment periods.
 - f. The Claim was only filed when the Defendant kept giving excuses and refused to pay and the Plaintiff needed funding to continue business operations.
 - g. The Assurance Letter of 26 July 2006 will be evidence used in the substantive matter.
 - h. The notice of fraudulent misrepresentation was when the Defendant replied to the Plaintiff's letter on 10 March 2023 and revealed intention of not paying the debt.
 - i. The Claim is not statute barred.
6. The Defendant filed reply affidavits sworn by Taniela Nakibo in response to both of the Defendant's Affidavits in Opposition, stating as follows
- a. The Plaintiff had 6 years from when the two cheques dated 26 May 2006 were dishonoured to initiate legal action against the Defendant.
 - b. The original action is based on alleged failure to pay the debt in 2006.
 - c. The Claim is time barred.
 - d. The onus is on the Plaintiff to put sufficient material before court including the Assurance Letter.
 - e. The pleadings as they stand cannot be sustained by the Plaintiff.
 - f. There is severe prejudice against the Defendant with the Claim brought 17 years after the cheques were written.

- g. The Plaintiff's Claim should be struck out.
7. Both parties made oral submissions at the hearing of the Summons and filed written submissions as well.
8. The Defendant is relying on Sections 4(1)(a) and 15 of the Limitation Act 1971 and Order 18 Rule 18 of the HCR.
9. Section 4 of the Limitation Act 1971 provides as follows:

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;...*

10. The Plaintiff's Claim is founded on breach of contract and fraud. As fraud is a tort, the Claim is subject to a limitation period of 6 years in accordance with section 4 mentioned above.

11. Section 15 of the Limitation Act 1971 further provides that:

Where, in the case of any action for which a period of limitation is prescribed by this Act, either –

(a) The action is based upon the fraud of the Defendant or his agent or of any person through whom he claims or his agent,; or

(b) The right of action is concealed by the fraud of any such person; or

(c) The action is for relief from the consequence of a mistake,

The period of limitation shall not begin to run until the Plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it....

12. Order 18 rule 18 provides:

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 case of action or defence, as the case may be;*
(b) *it is scandalous, frivolous or vexatious;*
(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.

13. The following excerpts from the 1997 Supreme Court Practice provide the scope of the rule together with guiding factors when dealing with an application for the strike out of a pleading.

14. Footnote 18/19/3 of the 1997 Supreme Court Practice reads:

Striking out or amendment—The rule also empowers the Court to amend any pleading or indorsement or any matter therein. If a statement of claim does not disclose a cause of action relied on, an opportunity to amend may be given, though the formulation of the amendment is not before the Court (CBS Songs Ltd v. Amstrad [1987] R.P.C. 417 and [1987] R.P.C. 429). But unless there is reason to suppose that the case can be improved by amendment, leave will not be given (Hubbuck v. Wilkinson [1899] 1 Q.B. 86, p.94, C.A.). Where the statement of claim presented discloses no cause of action because some material averment has been omitted, the Court, while striking out the pleading, will not dismiss the action, but give the plaintiff leave to amend (see “Amendment,” para. 18/12/22), unless the Court is satisfied that no amendment will cure the defect (Republic of Peru v. Peruvian Guano Co. (1887) 36 Ch.D. 489).

15. Footnote 18/19/7 of the 1997 Supreme Court Practice reads:

Exercise of powers under this rule—It is only in plain and obvious cases that recourse 18/19/7 should be had to the summary process under this rule, per Lindley M.R. in Hubbuck v. Wilkinson [1899] 1 Q.B. 86, p.91 (Mayor, etc., of the City of London v. Horner (1914) 111 L.T. 512, C.A.). See also Kemsley v. Foot [1951] 2 K.B. 34; [1951] 1 All E.R. 331, C.A., affirmed [1952] A.C. 345, H.L. It cannot be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action (Wenlock v. Moloney [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, C.A.).

16. Footnote 18/19/11 of the 1997 Supreme Court Practice reads:

(2) Limitation—Where it appeared from the statement of claim that the cause of action arose outside the statutory period of limitation, it was held that the statement of claim would not be struck out unless the case was one to which the Real Property Limitation Acts applied (see Price v. Phillips [1894] W.N. 213). However, if the defendant does plead a defence under the Limitation Act, he can seek the trial of a preliminary issue, or in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the Court (see, per Donaldson L.J. in Ronex Properties Ltd v. John Laing Construction Ltd [1983] Q.B. 398). Thus, where the statement of claim discloses that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the Limitation Act and there is nothing before the Court to suggest that the plaintiff could escape from that defence, the claim will be struck out as being frivolous, vexatious and an abuse of the process of the Court (Riches v. Director of Public Prosecutions [1973] 1 W.L.R. 1019; [1973] 2 All E.R. 935, C.A., as explained in Ronex Properties Ltd v. John Laing Construction Ltd, above).

[emphasis added]

17. The legal principles regarding striking out pleadings are clear and widely understood. The Court of Appeal in **National MBF Finance v Buli** [2000] FJCA 28 determined the principles for strike out. In **Attorney-General v Shiu Prasad Halka** 18 FLR 210 at 214 Justice Gould V.P. in his judgment expressed “*that the summary procedure under O.18, r.19 is to be sparingly used and is not appropriate to cases involving difficult and complicated questions of law.*”

18. The clear and unambiguous wording of Order 18 Rule 18 indicates that the power to strike out pleadings is discretionary rather than obligatory.

Is the Claim statute barred?

19. The Defendant’s counsel submitted that the Plaintiff’s claim for breach of the MOU is statute-barred under section 4(1)(a) of the Limitation Act 1971, as the cause of action arose in 2006 when payment was allegedly defaulted, and the Claim was filed in 2023 after 17 years.

20. The Defendant’s counsel further submitted that the last correspondence regarding the breach was on 02 February 2010, and the Claim was filed 13 years later. Neither party produced a copy of this correspondence before the Court.

21. Regarding the second cause of action on fraudulent misrepresentation, the Defendant’s counsel submitted that under section 15 of the Limitation Act 1971, the Plaintiff discovered the alleged fraud in 2006 when the Defendant’s cheques were dishonoured hence the Claim filed in 2023 is statute-barred.

22. The Plaintiff filed the Claim on 20 June 2023, contending that recovery efforts had persisted beyond 13 years, and alleged that the Defendant had repeatedly postponed payment through false verbal and written promises. Nevertheless, the Court observes that the Plaintiff's affidavit provides no proof of any such written promise.

23. The Plaintiff's counsel submitted that the Defendant acknowledged the debt in the Assurance Letter dated 26 July 2006 and attempted part payment through dishonoured cheques. The said letter was not produced, and the Plaintiff's counsel stated that it would be tendered at trial. If the Plaintiff intended to rely substantially on this particular letter, it was their responsibility to submit the same as evidence to this Court in its Affidavit in Opposition.

24. The Plaintiff's counsel relied on section 3 of the Limitation Act 1971, arguing that the acknowledgment of debt and attempted part payment extended the limitation period.

25. Section 3 of the Limitation Act 1971 states as follows:

3. The provisions of this Part shall have effect subject to the provisions of Part 3 which provide for extension of the periods of limitation in the case of disability, acknowledgment, part payment, fraud and mistake, and in the case of certain actions in respect of personal injuries.

26. Section 12(3) of the Limitation Act 1971 further provides:

(3) where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment, provided that a payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt.

27. Section 13(1) of the Limitation Act 1971 also provides that "every acknowledgment referred to in section 12 shall be in writing and signed by the person making the acknowledgement."

28. In essence, under section 12(3), the limitation period starts from any acknowledgment that constitutes a promise to pay. Furthermore, section 13(1) requires that such acknowledgment must be in writing and signed by the person making it.

29. In this matter a copy of the MOU has been provided by the Plaintiff in its Supplementary Affidavit in Opposition annexed and marked as "MAK 1". This MOU is signed on 26 July 2006 between one Hafiz Khan on behalf of the

Plaintiff and one Osea Naiqamu on behalf of the Defendant and states as follows:

- 1.1 *Fiji Pine Trust to release to Forest Enterprises machine costs for logging gangs totalling \$171,174.51 as at 9/6/06*
- 1.2 *Fiji Pine Trust to settle the above via lump sum payment of \$40,000.00 from grant proceeds or surplus funds from Lololo operation and thereafter at the rate of \$10,000 per month until all monies are paid in full.*

30. Furthermore, as previously observed, the Plaintiff has failed to produce the Assurance Letter, purportedly dated 26 July 2006, or any other documentary evidence establishing a written undertaking/acknowledgment by the Defendant to discharge the debt post 2006.
31. Moreover, copies of the two dishonoured cheques, allegedly issued in favour of the Plaintiff, are annexed to the Supplementary Affidavit in Opposition and marked as "MAK 3". Both cheques bear the date 26 May 2006.
32. This Court notes that the MOU is dated 26 July 2006. Even if the Court were to accept the existence of the Assurance Letter—though it has not been produced—that letter is also purportedly dated 26 July 2006.
33. Accordingly, I find that pursuant to section 12(3) of the Limitation Act 1971, the limitation period for the cause of action of breach of MOU commenced on that date (26 July 2006) and expired six years thereafter which is on 26 July 2012.
34. With respect to the cause of action for fraudulent misrepresentation, I find that the Plaintiff was aware of the dishonoured cheques in 2006 and not at any time thereafter. Consequently, pursuant to section 4 and 15 of the Limitation Act 1971, this claim also became statute barred in 2012.
35. Having determined that the Claim is statute barred, the said Claim should be struck out as being frivolous, vexatious and an abuse of the process of the Court.
36. The Plaintiff's counsel submitted that the Claim was founded not only on fraud and breach of the MOU but also on equitable compensation, thereby contending that acknowledgment of debt and part payment constituted sufficient grounds for equitable relief. However, the Plaintiff has not pleaded in its Claim any cause of action relating to equitable relief. Neither has the Plaintiff sought any orders to that effect. As such this Court cannot consider any submission on this point.
37. In any event, section 4(7) of the Limitation Act 1971 provides as follows in relation to equitable relief:

(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.

38. Section 26 of the Limitation Act 1971 further provides:

26. Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.

39. Cheshire, Fifoot & Furmston's *Law of Contract* (16th Ed, Oxford University Press, 2012) at pages 813 and 814 discussed the effect of lapse of time on equitable claims and stated the following:

First, in the case of equitable claims that formerly fell within its concurrent jurisdiction, equity acts on the analogy of the current Limitation Act. In the words of Lord Westbury:

Where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, a court of equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase that a court of equity acts by analogy to the Statute of Limitations, the meaning being that, where the suit in equity corresponds with an action at law which is included in the words of the statute, a court of equity adopts the enactment of the statute as its own rule of procedure.

Hence the Limitation Act 1980, after enacting that its provisions shall not apply to a claim for equitable relief, says 'except in so far as any provision thereof may be applied by the court by analogy'. Any proceeding in equity to recover a simple contract debt are subject to this doctrine of analogy...

*The second proposition is that in the exercise of its exclusive jurisdiction – in the case of purely equitable claims – equity, in accordance with the maxim *vigilantibus et non dormientibus lex succurrit*, refuses to grant relief to stale claims. A plaintiff who has been dilatory in the prosecution of his equitable claim and has acquiesced in the wrong done to him is said to be guilty of laches and is barred from relief, although his claim is not affected by any statute of limitation. ...*

This doctrine of laches is preserved by the Limitation Act 1980, in a section which provides that:

Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.

40. In view of the above legal principles, even if the Plaintiff had sought equitable relief in its Claim, the Plaintiff, by its prolonged inaction, had acquiesced to the wrong and is guilty of laches. In such circumstances, the Plaintiff would be precluded from obtaining such relief anyway.

41. Therefore, I make the following orders:

- (a) The Plaintiff's Statement of Claim is hereby struck out; and
- (b) The Defendant is entitled to costs summarily assessed in the amount of \$1,500.00, payable by the Plaintiff within 1 month.



P. Prasad
Master of the High Court

At Lautoka
19 December 2025