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

[CIVIL JURISDICTION]

Civil Action No. HBC 199 of 2011

BETWEEN	:	**ANIL SABHARWAL** of Motibhai Cresent of Ba Town ***Plaintiff***
AND	:	**ANASEINI LUISE BRULL of Nabare Road, Saweni Lautoka** ***1st Defendant***
AND	:	**PALM TREE HOLDINGS FIJI LIMITED registered office situated at Nabare Rd, Saweni, Lautoka** ***2ND Defendant***

Appearances

Mr Nacolawa for the Plaintiff

Mr E Maopa for the Defendant

Date of Hearing: 2 October 2013

Date of Ruling: 18 November 2013

R U L I N G

Introduction

[1] This is a Notice of Summons filed on 21 February 2013 by the defendants to strike out the plaintiff's claim. The application has been made pursuant to Order 18 Rule 18(1) (a) (b) and (c) of the High Court Rules (Fiji) 1988 (HCR) and the inherent jurisdiction of the High Court.

[2] The defendants have filed two affidavits in relation to the application. One is affidavits of Luise Anaseini Brull (1st defendant) sworn on 20 February 2013 and filed on 21 February 2013 in support of the application, another affidavit in reply to the affidavit in opposition to the striking out application.

[3] The defendants' striking out application is opposed by the plaintiff. The plaintiff has filed affidavit of Anil Sabharwal (plaintiff) sworn and filed on 20 March 2013 in opposition. The plaintiff has also exhibited documents marked "AS1" – "AS4" to his affidavit in opposition.

[4] Furthermore, both parties have filed their respective written submissions.

[5] In the statement of claim the plaintiff claims, inter alia, a sum of FJ$70,000.00 being his rightful shares of the settlement and damages. In order to understand the factual background of the case, I must read the statement of claim fully, which states as follows:

1. ***THAT*** *the 2nd Defendant is a limited liability company based at Nabare Road, Saweni, Lautoka and its subsidiary company is Kura Products deals in manufacturing Kura Products and another subsidiary company is Anotec Environmental Products deals with promoting Environmental Products.*

2. ***THAT*** *in or about February 2005 the Plaintiff acting as an agent of the Sellers proposed to sell the property of the sellers comprised in Crown Lease No. 5433 Lot 1 DP 3597 Bainivore Subdivision Nadroga/Navosa and Crown lease No. 5433 Lot 1 DP 3597 Bainivore Subdivision Nadroga/Navosa to the 1st Defendant for FJ$600,000.00 (Six Hundred Thousand Dollars)*

3. ***THAT*** *the* ***Plaintiff had an agreement with the 1st defendant that only through her refusal the said lands can only pass on other buyers***

4. ***THAT*** *at about the same time of the said Agreement Duncan Investments Limited as an interested buyer, showed interest in buying the said lands.*

5. ***THAT*** *also by this time Duncan Investments Limited approached the Sellers directly to buy the said lands without the knowledge of the Plaintiff and the Defendants.*

6. ***THAT*** *since the Duncan Investments Limited proceeded to purchase the said lands, the first defendant brought an action in the High Court Lautoka against both the sellers in civil action no. 157 of 2005 and action no. 191 of 2005 respectively.*

7. ***THAT*** *the* ***said court actions were solely instigated and financed by the Plaintiff on engaging the law firm of Mishra Prakash & Associates to pursue the above mentioned actions****.*

8. ***THAT*** ***the plaintiff and the defendant had agreed in the event should they pull through actions, the Plaintiff was to get the lion share of the proceeds and the defendant to receive nominal share.***

9. ***THAT*** ***the said actions ended up in an out of Court Settlement whereby, the Duncan Investments Limited a subsidiary or another arm of Melanesian (Properties) Limited was an eventual purchaser of the said lands and the 1st defendant was compensated in the sum FJ$90,000.00.***

10. ***THAT*** *the* ***first defendant on receiving the said compensation of FJ$90,000.00 failed and/or neglected and/or rejected and/or ignored to consult the Plaintiff for the payment of his rightful share including costs and related expenses incurred by the Plaintiff.***

11. ***THAT*** *since the settlement dated 6th August 2006 and as a good friend of the 1st defendant, the plaintiff has repeatedly been asking for the payment of his rightful shares of FJ$70,000.00 but without any success.*

12. ***THAT*** *the first defendant continuously gave various forms of excuses to avoid paying the Plaintiff his rightful shares of FJ$70,000.00.*

13. ***THAT*** *the plaintiff is suffering loss and damages as result of* ***breach of agreement (****My emphasis).*

[6] On 11 January 2012 the 1st defendant filed her statement of defence in person and admitted all the averments of the statement of claim and denied paragraphs 2 and 11-14 of the statement of claim. In her statement of defence the 1st defendant asks the Court to strike out the plaintiff's claim over the shares of the said settlement he has made against her in his statement of claim on the ground that he does not represent her as an agent in the sale and purchase proposal of the said properties, as he clearly admits in paragraph 3 of his statement of claim that he acted as an agent of the sellers of the properties.

[7] The learned counsel for the defendants submitted that the Plaintiff's action is statute barred under section 4(1) of the Limitation Act [Cap 35]. He further submitted that it is obvious that the limitation period had long expired by the time this action was instituted in 2011. There is nothing to suggest to the Court that the defendants' defence of statutory limitation can be overcome and it will be vexatious and an abuse of process to allow the Plaintiff to bring his claim.

[8] In contrast, Mr Nacolawa, counsel for the plaintiff argued that this matter (the matter that ended up in out of Court settlement) commenced in 2005 and concluded in 2006. This matter commenced on 5 December 2011, after that action was concluded (June 2006) and well within the 6 year limitation period.

The Law

a. Striking out:

[9] HCR Order 18 rule 18(1), which provides as follows:

"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" (Emphasis added).

b. The principles applicable to the striking out application:

[10] In **Paulo Malo Radrodro vs SioneHatuTiakia& others, HBC 204 of 2005,** a case where the High Court extensively and exhaustively explained the principles relating to striking out jurisdiction under HCR O.18 r.18. The Court stated that:

"The principles applicable to applications of this type have been considered by the Court on many occasions. Those principles include:

(a) A reasonable cause of action means a caution of action with some chance of success when only the allegations and pleadings are considered – Lord Pearson in Drummond Jackson v British Medical Association [1970] WLR 688.

(b) Frivolous and vexation is said to mean cases which are obviously frivolous or vexations or obviously unsustainable – Lindley Li in Attorney General of Duchy of Lancaster v L.N.W Ry [1892] 3 Ch 274 at 277.

(c) It is only in plain and obvious cases that recourse would be had to the summary process under this rule – Lindley MR in Hubbuck v Wilkinson [1899] Q.B 86.

(d) The purpose of the Courts jurisdiction to strike out pleading is two fold. Firstly is to protect its own processes and scarce resources from being abused by hopeless cases. Second and equally importantly, it is to ensure that it is a matter

of justice, defendants are permitted to defend the claim fairly and not subjected to the expense inconvenience in defending an unclear or hopeless case.

(e) "The first object of pleadings is to define and clarify with position the issues and questions which are in dispute between the parties and for determination by the Court. fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that the opposing parties can bring evidence on the issues disclosed– ESSO Petroleum Company Limited v Southport Corporation [1956] A.C 218 at 238" – James M Ah Koy v Native Land Trust Board & Others – Civil Action No. HBC 0546 of 2004.

(f) A dismissal of proceedings "often be required by the very essence of justice to be done"..... – Lord Blackburn in Metropolitan – Pooley [1885] 10 OPP Case 210 at 221 – so as to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless allegation – Lorton LJ in Riches v Director of Public Prosecutions (1973) 1 WLR 1019 at 1027" *(My emphasis)**.***

[11] In **Napolioni Kurucake Ratumaiyale v NLTB & Pacific Octopus Limited** [2000] 1 FLR 284 at 285 per Prakash, J:

"It is clear from the authorities that the Court's jurisdiction to strike out on the ground of no reasonable cause of action is to be used sparingly and only where a cause of action is absolutely 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"

c. Limitation

[12] Section 4 (1) of the Limitation Act provides:

"The following actions shall not be brought after the expiration of six 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) ...

(c) ....
(d) ....
(e)
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 six years there were substituted a reference to three years." (Emphasis added).

[13] In support of his argument that the statement of claim discloses a cause of action that arose outside the current period of limitation, learned counsel for the defendants cited the English Court of Appeal case of **Riches v. Director of Public Prosecutions** [1973] 2 All ER 935. In that case the Court held that:

> *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, vexation and an abuse of the process of the court."*
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> *"I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or could prevail. In principle I cannot see why not. If there is any room for an escape from the statute, well and good, if it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitation and must fail..."*
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> *The object of RSC Ord 18, r19 (which is equivalent to our O. 18, r 18) is to ensure that defendants shall not be troubled by claims against them which are bound to fail having regard to the uncontested facts. One of the uncontested set of facts which arises from time to time is when on the statement of claim it is clear that the cause of action is statute barred and the defendant tells the court that he*

proposes to plead the statute and, on the uncontested facts, there is no reason to think that the plaintiff can bring himself within the exceptions set out in the Limitation Act 1939. In those circumstances it is pointless for the case to go on so that the defendant can deliver a defense. The delivery of the defense occupies time and wastes money; and even more useless and time- consuming from the point of view of the proper administration of justice is that there should then have to be a summons for direction and an order for an issue to be tried and, for that issue to be tried before the inevitable result is attained"

Discussion and Decision

[14] The Defendants have made this application for striking out the Plaintiff's claim on two grounds; firstly the statement of claim does not disclose reasonable cause of action against the Defendants, secondly the claim is statute barred.

[15] The High Court may at any stage of the proceedings order to strike out any statement of claim on the ground that it discloses no reasonable cause of action pursuant to HCR O.18 r. (1) (a). When considering an application under O.18 r.18 (1) (a), no evidence shall be admissible. HCR O.18 r.18 (2) states so. I would decide and make my ruling by reading and considering the pleading as the Defendants' application has been made under O.18 r.18 (1) (a).

[16] I now venture to determine whether the statement of claim filed by the Plaintiff discloses a reasonable cause of action vis-a-vis the Defendants. Let me first decide whether the statement of claim discloses a reasonable cause of action. Upon reading the statement of claim I find that there has been nothing in the statement of claim against the 2nd Defendant except the description of the 2nd Defendant. Under para 2 of the statement of claim the Plaintiff says that the 2nd Defendant is a Limited Liability Company and it has some subsidiary companies. No allegation of facts has been stated against the 2nd Defendant. The statement of claim contains nothing to show how the 2nd Defendant is connected to the alleged transaction between the Plaintiff and the Defendant and why the 2nd Defendant is liable to the Plaintiff. Therefore, in my view the statement of claim discloses no reasonable cause of action as against the 2nd Defendant.

[17] Let me now find out whether the statement of claim discloses a reasonable cause of action against the 1st Defendant. Basically the Plaintiff's claim is based on fruits of two actions the 1st Defendant brought in the High Court in Nos. 157 of 2005 and 191 of 2005 against both the sellers.

[18] In February 2005 the Plaintiff acting as an agent of the sellers proposed to sell certain Crown Lease properties to the 1st Defendant for $600,000.00. The Plaintiff says that he had an agreement with the 1st Defendant that only through her refusal the properties can only pass to other buyers. In the meantime, Duncan Investment Limited (DIL) approached the sellers directly to buy the properties without the knowledge of the Plaintiff and the Defendants. DIL eventually purchased the properties. The 1st Defendant instituted civil actions (157 of 2005 & 191 of 2005) against the sellers. These actions ended up in an out of Court Settlement whereby the 1st Defendant was compensated in the sum of $90,000.00. According to the Plaintiff, these actions were solely instigated and financed by the Plaintiff on engaging law firm and the 1st Defendant had agreed in the event should they pull through the actions, he was to get the lion share of the proceeds and the 1st Defendant to receive the nominal share. The Plaintiff says he is entitled to $70,000.00 being his lion share of the proceeds.

[19] Apparently, the Plaintiff's claim appears to be based on an alleged oral agreement reached between the parties regarding proceeds of the civil actions instituted by the 1st Defendant against DIL. The alleged agreement has been reached in 2005. The civil proceeding brought by the 1st Defendant ended in an out of court settlement in June 2006. When did cause of action arise against the 1st Defendant? Was it in 2005 or in 2006? I would say cause of action against the 1st Defendant arose in 2006. The reason being that the Defendant had agreed in the event should they pull through the actions (the civil actions brought by the 1st Defendant against DIL), the Plaintiff was to get lion share the Proceeds. The civil proceedings concluded in June 2006. Therefore in my opinion the cause of action against the 1st Defendant arose in 2006. The Plaintiff had instituted the present action against the Defendants on 5 December 2011.

[20] Mr Maopa on behalf of the Defendants submitted that the Plaintiff's claim is statute barred under section 4 (1) of the Limitation Act. According to the proviso to section 4 (1) (a) of the Limitation Act an action founded on breach of duty by virtue of a

contract or of provision made by or under any Act etc must be brought within 3 years otherwise action founded on breach of simple contract must be brought within 6 years. The alleged transactions, he submitted, between the parties occurred in 2005. Therefore, the Plaintiff's cause of action, if any, arose then. He ought to have initiated this action within 3 years from 2005 i.e. in 2008.

[21] On the other hand, Mr Nacolawa on behalf of the Plaintiff submitted that the cause of action arose in June 2006 when the civil actions brought by the 1st Defendant concluded. The matter commenced on 5 December 2011, some 5 years after the action was concluded in June 2006 and well within 6 years limitation period.

[22] Can the Defendants raise statutory limitation objection while applying to strike out the claim on the ground that it discloses no reasonable cause of action against them? In **Riches'** case (supra) it was held that it is possible.

[23] The Plaintiff action, in my opinion, is founded on a simple contract. Therefore, pursuant to section 4 (1) of the Limitation Act, the action can be brought within 6 years. I disagree with Mr. Maopa that the Plaintiff should have brought the action within 3 years. The alleged cause of action arose in June 2006 and the writ of summons has been filed on 5 December 2011. Therefore, the Plaintiff has initiated the action well within the limitation period of 6 years.

[24] There was no argument advanced before me that the agreement the Plaintiff had with the 1st Defendant is an illegal agreement. The Plaintiff is attempting to enforce an agreement he had with the 1st Defendant. In the circumstances, it cannot be said that there is no reasonable cause of action against the 1st Defendant. A reasonable cause of action means a caution of action with some chance of success when only the allegations and pleadings are considered.

[25] The Defendant, in my view, has failed to show there is no cause of action exists against the 1st Defendant.

[26] Having considered the pleadings, case authorities and submissions advanced by both counsels, I hold that the statement of claim discloses a reasonable cause of action against the 1st Defendant which has some chance of success.

Orders:

(a) The claim against the 2nd Defendant is struck out as the statement of claim discloses no reasonable cause of action against it;

(b) The striking out application made on behalf of the 1st Defendant is struck out as the statement of claim discloses a reasonable cause of action against the 1st Defendant;

(c) Parties may apply for amendments of pleading, if need be;

(d) Costs shall be costs in the cause.

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M H Mohamed Ajmeer

Acting Master

18/11/13

At Lautoka