

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**CIVIL JURISDICTION**

**CIVIL ACTION No. HBC 131 OF 2011**

**BETWEEN** : **SIMONE ALLENE** of Flat 4, Gladstone Court, Anson Road, London,  
NW 24LA, Businesswoman.

**PLAINTIFF**

**AND** : **EDWARD VINCE JENNINGS** of Sheraton Fiji Resort, Nadi, Fiji.

**1<sup>ST</sup> DEFENDANT**

**AND** : **SEASHELL BUSINESS CENTRE LIMITED** a limited liability  
company having its registered office at Sheraton Fiji Resort Island, P  
O Box 10522, Nadi Airport.

**2<sup>ND</sup> DEFENDANT**

**Appearances** : Ms N. Samantha with Ms V. Buli for the plaintiff

Mr J. Sharma for the 1<sup>st</sup> & 2<sup>nd</sup> defendants

**Date of Hearing** : 1 & 2 November 2017

**Date of Submission** : 30 November 2017 (plaintiff), 30 November 2017 (defendants)

**Date of Judgment** : 2 February 2018

## **J U D G M E N T**

### **Introduction**

[01] The plaintiff brought this action against the defendants claiming among other things refund of GBP 36, 000.00 or its equivalent as at the date of judgment. The claim arises out of a verbal agreement entered into between the parties in 2005.

- [02] The defendants filed their defence and counterclaim. They admitted that the plaintiff paid a sum of \$110, 000.00 into Yoko Jennings ANZ Bank Account on 19 May 2005.
- [03] At trial, the plaintiff called two witnesses while the defendant called the first defendant in support of their respective claim. By consent of both parties, a bundle of documents was tendered.
- [04] Both the parties filed their respective closing written submissions. I am grateful to both counsel for their useful written submissions.

### **Background**

- [05] The background facts as gleaned from the statement claim are as follows.
- [06] Simone Allene, the plaintiff is a British citizen.
- [07] Edward Jennings, the 1<sup>st</sup> defendant is a shareholder and company director of Seashell Business Centre Limited, the 2<sup>nd</sup> defendant ("SBCL"). The share capital of SBCL is \$100,000.00 divided into one dollar each. 100 shares were issued of which 70 were issued to the 1<sup>st</sup> defendant and 30 were issued to Yoko Jennings, the wife of the 1<sup>st</sup> defendant.
- [08] In or about April 2005, the 1<sup>st</sup> defendant and the plaintiff reached an agreement for the plaintiff to take up 49% shareholding in SBCL for a consideration of \$110,000.00.
- [09] In May 2005, the 1<sup>st</sup> defendant and the plaintiff attended the office of the defendant's accountant Nanda & Co, Accountants in Nadi and completed Fiji Trade and Investments Board (FTIB) application form to facilitate the transfer of shares to the plaintiff.
- [10] The 1<sup>st</sup> defendant advised the plaintiff that in order for the application to be submitted to the FTIB, the plaintiff should send GBP36, 000.00 the funds she had in the UK. The 1<sup>st</sup> defendant represented to the plaintiff that the money should be paid into Yoko Jennings's personal account pending the completion of the formalities and provided the plaintiff with the bank account details of Yoko Jennings.

- [11] On 19 May 2005, the plaintiff transferred the sum of GBP 36,000 (totalling \$110,081.74) into the bank account of Yoko Jennings as instructed by the 1<sup>st</sup> defendant.
- [12] The plaintiff alleges that it was agreed between the plaintiff and the defendants that the transaction will be completed by May 2006.
- [13] In January 2006, the 1<sup>st</sup> defendant asked the plaintiff to return to Fiji to help run the operations of the SBCL and another of the 1<sup>st</sup> defendant's business known as Dive Tropex since he was scheduled to leave for Iraq in March 2006. The 1<sup>st</sup> defendant left for Iraq in March 2006 and in April 2006 the plaintiff returned to Fiji and started working for Dive Tropex and the SBCL.
- [14] According to the plaintiff, she enquired with the plaintiff on a number of occasion regarding the transfer of the shares to her as agreed and the 1<sup>st</sup> defendant in breach of the agreement failed and/or refused and/or neglected to transfer the shares to the plaintiff.
- [15] As a result, the plaintiff by a letter dated 14<sup>th</sup> July 2009 sent to the first defendant repudiated the agreement and demanded a refund of the sum of \$110,081.74. The first defendant refused to pay. The plaintiff instituted this action for the recovery of the fund she sent to the first defendant.

#### **Case for defendant**

- [16] The defendants in their amended statement of defence and counterclaim states that: they were waiting for the necessary regulatory approvals. Sometime in 2007, the plaintiff, after initiating a verbal dispute with the first defendant, left the premises of the SBCL, abandoned her position as operations manager and ceased rendering services to the SBCL and/or Dive Tropex. The plaintiff continued to collect wages despite not working. The plaintiff also continued to stay free of charge in the flat and drive the vehicle provided by the SBCL and/or Dive Tropex. Later, the plaintiff abandoned the vehicle at the Korotogo roundabout with the keys inside on the day of the vehicle's LTA registration expired, causing the SBCL unnecessary expense and loss to retrieve the same. The plaintiff also filed

complaints about the defendants with the FTIB. Eventually, the plaintiff left Fiji and the defendants did not hear anything further from her until sometime in 2009.

### **Counterclaim**

- [17] The defendants counterclaim damages against the plaintiff for the losses she caused to the defendants while working for or as an agent of the SBCL in that plaintiff, while working for or as an agent of the SBCL, undertook the negotiation of an agreement with the Westin Resort for the second defendant to relocate its business centre from the Sheraton Resort to the Westin Resort in the year 2007, which led to loss and damages to SBCL.
- [18] The background facts stated by the defendants for a counterclaim are as follows:
- [19] The second defendant installed and completed the tenant improvements and renovation works and provided new furniture and computers for the business centre at the Westin Resort at its own expense. Thereafter, the plaintiff agreed with the Westin Resort, without the defendants' knowledge or approval and without the appropriate authorization from the Board of Directors of the SBCL, to move the SBCL's business centre to another location inside or next to the conference room at the Westin Resort.
- [20] The defendant alleges, the plaintiff acted negligently and/or wrongfully and/or without authorization in breach of her duties as an employee and/or agent of the defendants. As a result of the plaintiff's actions, the SBCL was forced to remove its newly installed furniture and computers from the already fitted out business centre as the same would not fit into the new space and had to abandon its tenant improvements and/or fixtures already installed in the business centre.
- [21] The plaintiff also undertook the renewal of Dive Tropex's lease agreement with the Westin Resort. After the plaintiff walked out and abandoned her position and duties as operations manager, the Westin Resort refused to renew Dive Tropex's lease agreement.

## The evidence

### *Plaintiff*

[22] The plaintiff called 2 witnesses namely, Ms Simone Allene, the plaintiff (PW1) and Sanjesh Narayan, an officer from the FTIB (known as Investment Fiji) (PW2).

[23] PW1's evidence is as follows:

- a) She is a British citizen, teacher and private tutor in Thailand.
- b) She came to Fiji in December 2004 and stayed in Nadi. Went to Ed's Bar and met locals. She met Edward Jennings. He had Dive Company and business centre at the hotel. Since she is a dive instructor she went diving. Mr & Mrs Jennings showed her around their company. She did socialize with Edward Jennings and his wife, Yoko Jennings.
- c) The tsunami hit Thailand. She returned to Thailand to help people. She left Fiji beginning January.
- d) She came back to Fiji at the end of April 2005. She still had belongings at her host's place in Nadi. She met Edward Jennings and Yoko in April 2005. He had made a good offer to be part of his business – Seashell. She thought good opportunity to start a good life. His 2 companies were interrelated. He invited and set a place for her in the company. He told her what her minimum investment would be. She had knowledge from her previous discussion with FTIB. Edward Jennings told her that the procedure would take time and if she put everything in place, paper work will be ready by 2006.
- e) Met Ashvin Nandha. Paperwork is done for her to become 49% shareholder. Signed FTIB form. Signed a similar form in May 2005. Ashvin Nandha was introduced by Edward Jennings. He is his accountant.
- f) Edwards Jennings asked her to transfer the fund to Yoko's account. She asked why funds go into different accounts and not into the company account. Edward Jennings told her that funds would be in Yoko's account and then go to the company after FTIB approval.
- g) Funds were her investment into the company for dividends. She sent funds to Fiji on GBP 36, 0000 – F\$110,081.74 (Doc/19). She returned to Thailand after transferring the fund. She expected to be in Thailand until May 2006

but in December 2005, Edward Jennings contacted her via email and told her that he was having issues with Dive Tropex.

- h) In January 2006, he said his partner left and asked whether she could come to Fiji and help. He was also leaving for Iraq to work. She said she would not come back to Fiji as she had certain commitments and could not return until April 2006.
- i) When she came in April 2006, Edward Jennings was already in Iraq. Yoko and Rose were around. Yoko – Director and Diver. Rose (Accounts). Yoko would come a few days a week. Rose there every day. She was settling in. She did what she'd best. Looked after visitors to Fiji.
- j) They supplied accommodation. Shared accommodation. Shared with a Japanese Dive instructor – Ken. The company paid for the house. It was 2 bedroom house. Fully furnished. Moved properties after a few months. 2<sup>nd</sup> property partly furnished. She bought some furniture herself.
- k) Her major duties were collecting divers, ensure boat available, pick and drop, internal management, liaison with Hotel Management, diving. Edward Jennings had informed Hotel that since he was going away they could contact her. Edward Jennings at this time was in Iraq. There would be email contact with Edward Jennings.
- l) His previous experience was invaluable. She would handle a lot of things but decide together.
- m) Rose Chand has worked for Edward Jennings for a long time. She handled payments etc. She knew people. Without Rose and Yoko's input, she (plaintiff) would not have settled properly. Yoko – she created a company with her hard work. She knew how things were done.
- n) She said Edward Jennings would give advice if she had difficulties. Edward Jennings had asked to be notified of things as she was settling in.
- o) Hotel Management (Sheraton, Westin) changed every 3 years so she has to rebuild relations.
- p) Had issues with boats-Engineering. Nothing major. Sometimes could not go out diving. It's day to day running.
- q) Edward Jennings came back in June 2006. He was helping her settle in. He was giving more advice. That was the first time I enquired about the share certificate. She had paid for 49% shareholding and needed proof that she

was 49% shareholder. He said it was being handled. Fiji time was mentioned. He said it takes time.

- r) Saw him next in September 2006. She asked where her share certificate was. The answer she got was a bit rough. She continued working.
- s) Finally, she asked again in December 2006. He said *'because Christmas holidays, no share certificates to be issued'*. She didn't ask thereafter. Because very busy. She was settling well. She was learning day by day.
- t) Hotel policy had changed. They wanted the business centre to be moved from Sheraton to Westin. There were issues re contract renewal. Sheraton policies changed. We were informed previously 3 years contract were given. Now they go to 1 year contract. All would be passed to Edward Jennings. Some to Yoko but Yoko did not deal with paper work.
- u) Her attention turned back to Thailand, as she was invited to go to Thailand in June 2007. A friend paid the fare for me to go to Thailand.
- v) Salary – 2000 to 1500 to 1000. Rose Chand told me that financial problem.
- w) She returned to Fiji in July 2007. When I returned Edward Jennings was here. He was handling things in my absence. The atmosphere was tensed and difficult. Things were not right between us. On 26<sup>th</sup> July he said *'I was rude to the sister of the boat owner. I was terrible with clients. I swear'*. She said *'I admit I swear. He was incredibly angry with me. All I was doing was working 6 to 7 days a week. All I wanted was my 49% share. He said there was no place for me. My work permit went out 10 July 2007. I had put in to renew work permit they said they wanted a letter from Yoko about the money I sent to Yoko. Initially, Yoko said yes then said no – won't give a letter. If can't get a letter then work permit won't be renewed. Can't work in Fiji. All happened over few days when I came back from Thailand. He was aggressive – Bully. I asked him where my share certificate was. Rose Chand was there. She heard me ask for Share Certificate. Jennings told me to look around. This is it. I realize what had happened so I left'*.
- x) Rose Chand came to her. She said to Rose *'I didn't want July 2007 salary'*. She said she would pay for the house until August. Rose Chand same lady who works at Tropical Expose/Seashell.
- y) She had a company car. Rose Chand said I could use it as long as I wanted. Car registration had expired. She told Rose Chand when she had left the car for her to pick up in Korotogo.

- z) She had talked to Solicitor in Nadi – Babu Singh. Worried about 49% shares. Met Ashvin. He gave her forms and document. She noticed her signature forged.
- aa) Florence Nand was helpful at FTIB. Had an issue because her work permit had expired. She didn't want to be deported. With patience and some trips, she got an extension. She went back to Thailand eventually to start over in Thailand.

[25] In cross examination PW1 said that:

- a) She became involved in the operations of the 2<sup>nd</sup> defendant from 2006.
- b) She received housing and monetary benefits from the 2<sup>nd</sup> defendant.
- c) FTIB approval was granted to her to invest in Fiji as a foreigner.
- d) She was going to become a 49% shareholder in the 2<sup>nd</sup> defendant. Yoko was to transfer 30% of her shares and Jennings was to transfer 19% of his shares to her.
- e) She did not follow up with Ashvin Nandha for the issue of shares to her. She did not go and see Ashvin Nandha when shares were not transferred to her.
- f) Reserve Bank of Fiji Approval had not been granted for the issue of shares to her.
- g) She sent the money to Yoko Jennings. She has not sued Yoko Jennings.
- h) She did not send any emails to Edward Jennings to ask for transfer of shares.
- i) In July 2007, after the argument, Jennings had offered to transfer shares to her but she refused to accept the shares.

[26] PW2, Senior Investment Advisor from Investment Fiji in his evidence stated:

- a) According to the records, the application form for Allene & Jennings was lodged by the agents Ashvin Nandha in 2005. FTIB application also received by Investment Fiji. This was lodged by Mr Ashvin Nandha. For any foreigner who wants to do business in Fiji, they have to get FTIB approval first before they get approval from another department. FTIB certificate issued on 20 October 2005. Application filed on 9 September 2005. Lodged by Ashvin Nandha of Nandha & Company.



- b) Assistance request from Simone Allene for work permit extension by letter dated 24 August 2007 addressed to Florence Nand. He took over from Florence Nand. Simone said '*issues between shareholders of Company.*'
- c) FTIB gave its approval for foreign investment by Simone upon noting that her funds were brought into Fiji. 2<sup>nd</sup> defendant has a current FTIB Certificate. It has never been withdrawn by FTIB.
- d) If an Investor's Work Permit expires then the Investor can leave Fiji voluntarily without being deported by Immigration.
- e) Foreign Investment Survey (FIS) Form is in the file. Foreign Investor fills to show Company is operating. This declares that Investor doing business. This validates the FTIB's (now Investment Fiji) approval and Certificate. Certificate initially valid for 12 months. Within 12 months the Foreign Investor must state they're doing what they approved for.
- f) Letter from FTIB to Immigration on 17 September 2007 recommending 6 month work permit extension for Simone Allene. Any Foreign Investor needs a work permit to work. In principle, they get 3 years. But initially for 1 year. Upon approval of Investment Fiji, get the balance of 2 years.
- g) Based on her situation, the company was not operating or had not provided all documents, so we only recommended 6 months and if they cannot comply in 6 months, they can apply for an extension.
- h) Once company was registered with Investment Fiji, they
  - Need to go to immigration for work permit
  - FRCA – Vat + Tax
  - RBF – get approval for issue of shares to foreigner;
  - Need to go to company office – Change Solicitor
- i) At that time no time limit for approvals given. Now 3 months given them 12 months to implement and start a business.

[27] Under cross examination PW2 stated:

- j) Simone had filled out, signed and lodged FTIB Foreign Investment Survey Form (FIS) in September 2007 on behalf of the 2<sup>nd</sup> defendant (DEx1).
- k) In the FIS Form, Simone stated that she is working on complying with Reserve Bank of Fiji approval requirement.

- l) Simone could have ensured that all requirements for transfer of shares complied with.
- m) For Foreign Investment to be granted, the investor has to show available funds. This can be done by bringing funds into Fiji and getting confirmation from a local bank.
- n) FTIB gave its approval for foreign investment by Simone upon noting that her funds were brought into Fiji.
- o) 2<sup>nd</sup> defendant has a current FTIB Certificate. It has never been withdrawn by FTIB.
- p) If an investor's work permit expires then the investor can leave Fiji voluntarily being deported by Immigration.

*Defendant's evidence*

[28] The defendant called 2 witnesses. They were the 1<sup>st</sup> defendant, Edward Jennings (DW1) and Roseline Chand (DW2).

[29] DW1 in his evidence stated that:

- a) He and his former wife, Yoko Jennings are the shareholders of the 2<sup>nd</sup> defendant. Yoko owns 30% shares and he owns 70% shares.
- b) Yoko had set up the 2<sup>nd</sup> defendant. She then took a job with JTB and Jennings was hoping to get a Security Analyst Job in the Middle East. They wanted to dissolve their interest in the 2<sup>nd</sup> defendant. Around late 2004 to early 2005, he met Simone who was interested in investing in the 2<sup>nd</sup> defendant.
- c) Simone saw the 2<sup>nd</sup> defendant's operations and she liked it and wanted to invest. They went to FTIB in Suva and upon obtaining advice from FTIB, they met with Ashvin Nandha, an Accountant in Nadi who was instructed to do the needful to transfer Jennings 19% and Yoko's 30% shares in the 2<sup>nd</sup> defendant to Simone. They gave the required information and Ashvin prepared documents which were later signed by him and Simone.
- d) After doing the needful and signing the necessary documents with Ashvin Nandha, he left for the Middle East as he had gotten a contract as a Security Analyst.
- e) Simone then came to Fiji and took over the operation of the 2<sup>nd</sup> defendant. So far as he was concerned, everything was handled and the needful had

been done for the transfer of shares to Simone. Simone never told him that shares were not transferred to her.

- f) Jennings was in the Middle East in a high tension environment most of the time. Simone was here. If shares had not been transferred then she should have taken action and gone and seen Ashvin Nandha.
- g) Simone never brought up the issue of shares with him. If she had spoken with him and he had not taken action then Simone should have emailed him. She never emailed him to inquire about the shares.
- h) In the middle of July 2007, when he came to Fiji, he was informed by Roseline Chand (Rose) that Firefighting equipment had been removed from a large Dive Boat upon Simone's instructions. Equipment had subsequently gone missing. Due to the equipment being removed, the Dive Boat was grounded by the Marine Department and the company was losing money. Equipment was also very expensive. He confronted Simone and after a heated argument, Simone left the 2<sup>nd</sup> defendant's premises.
- i) He then returned to the Middle East. Before leaving he told Roseline to keep on reaching out to Simone for her to come back to continue with the 2<sup>nd</sup> defendant.
- j) He later received a phone call advising that the 2<sup>nd</sup> defendant's vehicle which was given to Simone had been abandoned on the road side in Korotogo, Sigatoka. He then called Roseline Chand and asked her to go pick up the vehicle.
- k) Jennings has not received any single cent of the money that Simone had paid into Yoko's account. Since money was paid into Yoko's account Jennings had no control over it. He does not know what exactly happened to the money but thinks that some money would have been used to pay 2<sup>nd</sup> defendant's debts and expand 2<sup>nd</sup> defendant's business. Rest was taken by Yoko.
- l) 2<sup>nd</sup> defendant's business suffered and eventually closed. Simone had been in control of the 2<sup>nd</sup> defendant. Because of her neglect, 2<sup>nd</sup> defendant's business closed down.

[29] DW2 gave evidence as follows:

- q) She had been employed by the 2<sup>nd</sup> defendant. She was also known as Rose Chand. She was also employed by the 1<sup>st</sup> defendant's other Companies. She left the 2<sup>nd</sup> defendant in 2007/08 when the 2<sup>nd</sup> defendant's business closed down.
- r) She knows Simone. She was a Director of the 2<sup>nd</sup> defendant. Other Directors were Jennings and Yoko.

- s) Simone joined in April 2006. Once Simone joined, Simone was seen to be the Boss. Simone did not conduct herself as an employee. She conducted herself as the boss.
- t) Jennings had already left for Iraq by the time Simone joined. Yoko would also come to the office may be once a week. When Jennings came to Fiji every 3 or 4 months interval then he would come to office briefly. Simone ran the show. She made all the operational decisions.
- u) Before Simone joined the 2<sup>nd</sup> defendant, business was good. After Simone joined business went down. Simone's relationship with employees was not very good. Once the boys threatened to walk off the job and I had to call Jennings. He came and sorted it out. Simone's relationship with the guests was not the best either.
- v) Simone had had firefighting equipment removed from a large dive boat because of which marine department grounded the boat. It was the biggest money maker for the company. The equipment went missing later. When Jennings found out he was not happy and he confronted Simone. This was around July 2006. Simone got angry and left. Jennings did not bully Simone. I did not hear Simone ask Jennings about shares.
- w) Simone did not come back after that. I continued sending her wages to Simone with her flat mate Ken. Jennings had told me to continue looking after Simone.
- x) Jennings had called and told me that Simone had left her company vehicle on the roadside in Korotogo, Sigatoka and for me to go and get it. I went to get it. The vehicle did not have fuel. We filled it up and brought it back.
- y) She never heard Simone asking Jennings about shares.

[30] In cross-examination DW said that:

- a) She admitted that Jennings was also the boss.
- b) She also admitted that Simone used to share a flat with a Japanese Instructor, Ken and that she used to do banking for the staff that's how she knew Simone was paid \$650.00.
- c) The company had a register which was retained by the company.
- d) She used to go to Mr Nandha and was privy to company account and she used to do the day to day books of the company and take receipts to Mr Nandha.
- e) She admitted she used to report to Yoko as she was still a Director.
- f) She said Simone should have consulted Jennings before removing the fire extinguisher.

## Statutory framework

[31] Section 11 of the Exchange Control Act Cap 211 and section 4 of the Limitation Act are relevant.

[32] Section 11, ECA provides, so far as relevant:

### *Transfer of securities and coupons*

11.-(1) *Except with the permission of the Minister, a security registered in Fiji shall not be transferred, and a security not so registered shall not be transferred in Fiji, unless, in either case, the following requirements are fulfilled, that is to say:-*

- (a) *neither the transferor nor the person, if any, for whom he or she is a nominee is resident outside Fiji; and*
- (b) *the transferor delivers to the transferee at or before the time of the transfer the prescribed declarations as to his residence and that of the person, if any, for whom he or she is a nominee; and*
- (c) *neither the transferee nor the person, if any, for whom he or she is to be a nominee is resident outside Fiji; and*
- (d) *except where the security is registered in Fiji otherwise than in subsidiary register, the Minister is satisfied that the requirements of paragraph (c) are fulfilled,*

*Provided that –*

- (i) *neither the transferee nor his or her agent shall be deemed to have committed an offence by reason only that the requirements of paragraph (a) were not fulfilled unless the transferee or, as the case may be, his or her agent, knew or had reason to believe that those requirements were not fulfilled; and*
- (ii) *neither the transferor nor his agent shall be deemed to have committed an offence by reason only that any of the requirements of paragraphs (c) and (d) have not been fulfilled unless, in the case of a non-fulfilment of the requirements of paragraph (c) the transferor*

*or, as the case may be, his or her agent, knew or had reason to believe that those requirements were not fulfilled.  
(Amended by Legal Notice 112 of 1970; Act 24 of 1979, s. 10.)*

[33] Section 4, LA provides:

*4 (1) (a) 'actions founded on simple contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued' (emphasis provided)*

### **Discussion and decision**

[34] The plaintiff claims a refund of \$110,081.74, which the plaintiff invested in the 2<sup>nd</sup> defendant. The action is based on a verbal agreement between the plaintiff and Jennings, the 1<sup>st</sup> defendant wherein the plaintiff was to invest in the 2<sup>nd</sup> defendant and the 1<sup>st</sup> defendant to transfer 49% shares of the 2<sup>nd</sup> defendant to the plaintiff. The plaintiff alleges that the 1<sup>st</sup> defendant refused and/or neglected to transfer the shares to the plaintiff as agreed despite several requests by the plaintiff. As a result, the plaintiff repudiated the agreement via a letter dated 14 July 2009 sent to the defendant through her solicitors and demanded a refund of the money which the 1<sup>st</sup> defendant refused.

[35] The primary issue that arises here is whether the plaintiff is entitled to get a refund of \$110, 081.74 the money she transferred to Yoko's (1<sup>st</sup> defendant's wife) bank account for investment in the 2<sup>nd</sup> defendant for the consideration of transfer 49% shares in the 2<sup>nd</sup> defendant to the plaintiff.

### **Limitation issue**

[36] Before deciding the primary issue, I will deal with the limitation issue the defendants had raised in their statement of defence.

[37] The defendants in their statement of defence say of course without giving any particulars that the plaintiff's claim is statute barred under section 4 of Limitation Act.

- [38] Pursuant to section 4 (1) (a), LA actions founded on simple contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action arose.
- [39] It is contended on behalf of the defendants that the plaintiff entered into an agreement with the defendants and Yoko Jennings in or around April or May 2005. The plaintiff transferred the sum of \$110, 081.74 into Yoko Jennings bank account on 19 May 2005. The plaintiff issued her writ of summons on 15 August 2011. Therefore, the claim is barred by section 4 of the LA.
- [40] Counsel for the plaintiff submits that the writ was issued on 15 August 2011 and breach occurred in 2006 when shares were not transferred by the defendants to the plaintiff. The cause of action accrues not from the date when the agreement is entered into but when there is a breach which in the circumstances of this case was in 2006.
- [41] Undoubtedly, the plaintiff's action is founded on a simple contract.
- [42] Section 4 (1) (a) enforces a six-year limitation period on actions founded on simple contract. According to that section, the period of 6 years must be calculated from the date when the cause of action arose. The limitation period begins to run from the date on which the cause of action arose but not from the date on which the contract was made.
- [43] Both parties are giving different version as to the date on which the cause of action arose. The plaintiff says the cause of action accrued in 2006. The plaintiff does not give any particular date and month. For the defendants, the cause of action arose on 19 May 2005 when the plaintiff transferred the fund as per the agreement.
- [44] For my part, I would say the cause of action did not arise on 19 May 2005 as the defendants allege. It did not arise in 2006 either. The 1<sup>st</sup> defendant maintains that he never refused to transfer the shares to the plaintiff and that the plaintiff never asked to transfer the shares. He said the plaintiff was never given a share certificate and all process was handled by Mr Nandha his accountant whom he had instructed. According to the plaintiff, she had asked for the transfer of shares a number of times. There were no written requests for the transfer of shares by the plaintiff until 14 July 2009 when the plaintiff repudiated the contract and demanded a refund of the

money. In my judgment, the cause of action arose on 14 July 2009 when the plaintiff repudiated the contract. The cause of action arose on 14 July 2009 and the plaintiff issued her writ of summons on 15 August 2011. The action is filed well within six years. Therefore, I find that the action is not caught by limitation and it is not statute barred.

### **The primary issue**

- [45] I now turn to the primary issue that whether the plaintiff is entitled to the money she sent.
- [46] The plaintiffs transferred money into the business. The 1<sup>st</sup> defendant promised that he will transfer 49% share of the 2<sup>nd</sup> defendant of which the 1<sup>st</sup> and 2<sup>nd</sup> defendants are the shareholders and directors. The transfer of shares did not happen. The 1<sup>st</sup> defendant failed to transfer despite several oral requests.
- [47] It is not in dispute that the plaintiff transferred the money into the business and an application was made for Foreign Registration Certificate. It is also not in dispute that the plaintiff will bring the money as a foreign investment into the business and 49% of the shares will be transferred to the plaintiff.
- [48] The 1<sup>st</sup> defendant accepted that the transfer of shares was not effected. However, he maintained that the plaintiff never asked for the transfer of shares. He said all relevant documents were given to Mr Nandha to process the transfer.
- [49] Upon transfer of the money, the plaintiff was running the business as a director and she took major decisions concerning the business. She received salary and perks including hotel accommodation.
- [50] The plaintiff by her letter dated 14 July 2009 sent through her solicitors to the 1<sup>st</sup> defendant repudiated the agreement and demanded a refund of \$110, 081.74 (Ex8).
- [51] It is notable that the plaintiff did not claim damages for breach of contract. She has based her claim on the doctrine of '*unjust enrichment*'. Under this doctrine, an innocent party may recover any money or benefit conferred on the other party in certain circumstances.
- [52] In *Attorney General of Fiji v Auto Direct & Equipment Ltd* [2007] FJHC 139; HBC 445.2004 [28 November 2007] it was held that:



*“Where a sum of money has been paid pursuant to a contract and there has been, as is the case here, total failure of consideration then the principles of unjust enrichment dictate that the person who paid is entitled to have his money back: Fibroska Spolka Akeojna v. Fairburn Lawson Umbe Barbow (1943) A.C. 32.”*

- [53] As the plaintiff is a non-resident, Reserve Bank of Fiji’s (RBF) approval was necessary pursuant to section 11, EXA. The word ‘securities’ in the EXA includes shares. The Minister’s powers to grant approval for the transfer of shares to a non-resident has been delegated to the RBF.
- [54] Although the plaintiff obtained approval from the FTIB, the RBF’s approval was pending. The plaintiff in her evidence confirmed that she did not obtain the RBF’s approval for the transfer of shares. The 1<sup>st</sup> defendant could not have transferred the share to the plaintiff without the approval of the RBF. Any transfer of shares without RBF’s approval would be unlawful.
- [55] PW2, Senior Investment Officer of FTIB accepted that the approval process, including obtaining approval from RBF can be a time consuming affair and FTIB recognises this and allows time to comply with the requirements.
- [56] The plaintiff did not obtain the required RBF’s approval in order to complete the transfer of shares to the plaintiff. This might be considered as a frustrating situation which had caused the delay in the completion of share transfer to the plaintiff. In her evidence, the plaintiff stated that she wasn’t too concerned. This confirms the defendant’s evidence that the plaintiff never requested the transfer of shares.
- [57] The defendant contends that the money was transferred into Yoko’s bank account and Yoko was not sued. The plaintiff had an agreement with the 1<sup>st</sup> defendant and had all the dealings with the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant gave Yoko’s bank account number and advised the plaintiff to deposit the money into Yoko’s bank account. Therefore, the 1<sup>st</sup> defendant has to take responsibility for the money the plaintiff transferred to Yoko’s account. It is immaterial whether or not the plaintiff has made a claim against Yoko.
- [58] On the evidence, I find that the plaintiff is entitled to refund of the money invested in the business. The question now arises whether the plaintiff is entitled to the whole

sum she invested in the business. I would say she is not entitled to the refund of whole sum but a portion of it. The 1<sup>st</sup> defendant gave evidence that the business suffered a considerable loss by the bad management of the plaintiff. He said:

*'In the middle of July 2007, when he came to Fiji, he was informed by Roseline Chand (Rose) that Firefighting equipment had been removed from a large Dive Boat upon Simone's instructions. Equipment had subsequently gone missing. Due to the equipment being removed, the Dive Boat was grounded by the Marine Department and the company was losing money. Equipment was also very expensive. He confronted Simone and after a heated argument, Simone left the 2<sup>nd</sup> defendant's premises.*

*He further said:*

*2<sup>nd</sup> defendant's business suffered and eventually closed. Simone had been in control of the 2<sup>nd</sup> defendant. Because of her neglect 2<sup>nd</sup> defendant's business closed down.'*

[59] DW2 who was an employee of the defendants confirmed what the 1<sup>st</sup> defendant said about the loss and closure of business of the second defendant.

[60] I accept as credible the defendant's evidence on the failure of the business of the second defendant as the result of the plaintiff's bad management.

[61] I consider the loss the plaintiff caused to the defendant's business as substantial. I would, therefore, decide that the plaintiff is entitled to 50% of the money she invested in the business. This means she will be entitled to GBP18, 000.00 only. I decline to grant other relief the plaintiff is seeking such as loss of income, interest, and general damages for inconvenience and mental anguish. On the evidence, I think I should not grant these claims.

### **Counterclaim**

[62] The defendant did not lead evidence in respect of the counterclaim they made against the plaintiff. I would, therefore, strike out and dismiss the counterclaim.

## Conclusion

[63] For the reasons given, I hold that the plaintiff is entitled to 50% refund of the money she invested in the business, which means that there will be judgment in favour of the plaintiff in the sum of GBP18,000.00 (or its equivalent in Fijian dollar at the date of this judgment). I would decline to grant interest on the judgment sum. Both parties will bear their own costs.

## The final outcome

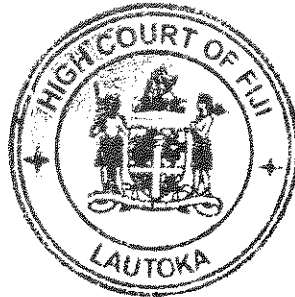
1. Judgment in favour of the plaintiff in the sum of GBP18, 000.00 (or its equivalent in Fijian dollar at the date of this judgment).
2. No order as to interest.
3. Parties to bear their own cost.

*M. H. Mohamed Ajmeer*

..... 2/2/18 .....

M. H. Mohamed Ajmeer

JUDGE



At Lautoka

02 February 2018

Solicitors:

For the plaintiff: M/s AK Lawyers, Barristers and Solicitors

For the defendants: M/s Janend Sharma Lawyers, Barristers and Solicitors