IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 298 OF 2022

BETWEEN	:	**CLYDE JESBIL KINGS** of Suva, Fiji, Resort Manager. **PLAINTIFF**
AND	:	**NIRAJ KASHI PRASAD** and **SHYAM KUMARI**, both of Sigatoka, Fiji. **DEFENDANTS**
COUNSEL	:	Ms. Prakash. A, with Ms. Degei, For the Plaintiff. Mr. Sunil Kumar, For the Defendants.
DATE OF HEARING	:	9th February 2023.
WRITTEN SUBMISSIONS	:	By the Plaintiff & the Defendants on 09th February 2023.
DATE OF RULING	:	On 3rd May 2023.

RULING
(On the Application for Interim Injunction and Striking Out)

1. The plaintiff, on 8th November 2022, filed his writ of summons and statement of claim seeking the following reliefs against the defendants.

    i. *Specific performance for the initial Sale and Purchase agreement dated 6th December 2022 ; (should be read as 2021)*
    ii. *General damages for the breach of the sale and purchase agreement;*
    iii. *Costs of the proceedings on a full indemnity basis;*
    iv. *Should (i) not be granted for any reason , then a full refund of the deposit amount paid to the Defendants;*
    v. *Such further order and/ or relief as this Honorable Court may deem just and expedient.*

2. The plaintiff on 8th November 2022, also filed an Inter-partes Notice of Motion, seeking the following orders and / or reliefs:

    1. *An Injunction restraining the Defendants by themselves and / or by their servants or agents or by whomsoever from taking , selling , leasing, transferring, assigning, and/ or in any manner or form howsoever from dealing or disposing of the property comprised in Housing Authority Lease No. 360440 being Lot 25 on DP 5850 , Vuda , containing an area of Four Hundred and Fifty Seven Meters squared until the further Order of the Honorable Court.*

    2. *An Injunction restraining the Defendants from dealing with the occupants of Housing Authority Lease No. 360440 being Lot 25 on DP 5850, Vuda either by themselves or by their servants, agents.*

3. *An Injunction restraining the Defendants from dealing with the utilities and use of the premises by the plaintiff and the Occupants of Housing Authority Lease No. 360440 being Lot 25 on DP 5850, Vuda.*

4. *For such further or other order(s) as this Honorable Court may deem just and expedient or necessary in the circumstances.*

5. *Directions for the conduct of the proceedings.*

6. *Damages,*

7. *Costs on the indemnity basis.*

3. The Inter Partes Notice of Motion is supported by an Affidavit sworn by the Plaintiff on 18th October 2022 and filed on 8th November 2022, along with annexures marked as "CJK 1" to "CJK 10".

4. The said Notice of Motion being supported before me inter partes on 21st November 2022 , learned Counsel for the Defendants Mr. Sunil Kumar , on a suggestion by Court, undertook not to deal with the property till the injunction Application is disposed, for which learned Counsel for the Plaintiff too was agreeable. Accordingly, with this undertaking, the Defendants were granted 21 days to file their Affidavit in opposition and the Plaintiff was granted 14 days to file reply Affidavit.

5. The Defendants, having filed their acknowledgment of service on 23rd November 2022, filed the first named Defendant's Affidavit in opposition on 13th December 2022, along with the annexures marked as "NKP 1" to "NKP4". Simultaneously , they also filed their Summons pursuant to Order 18 rule 18 (1) (a), (b), (C) , (d) of the High Court rules 1988 seeking that the plaintiff's writ of Summons with the Statement of Claim and Injunction Application be wholly struck out for the reasons stated in the said Affidavit sworn by the first named Defendant, **Niraj Kasi Prasad**. The said Affidavit, while serves as the Affidavit in opposition for injunction Application, also serves in support of the Defendants' striking out Application.

6. The Plaintiff, after filing his Affidavit in reply sworn on 10th January 2023, together with annexures marked as **"CJK 1" to "CJK 4"**, on 19th January 2023 filed his SUMMONS to enter Interlocutory Judgment pursuant to Order 19 Rule 7 of the High Court Rule 1988, which is supported by an Affidavit sworn by one **Preeti Pooja Sharma.** This Summons will warrant consideration only in the event the Plaintiffs action survives the said Summons for striking out.

7. **Order 18 rule 18 of the High court** Rules 1988 provides:

> *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.

8. 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.

9. In **Drummond-Jackson v British Medical Association [1970] 1 W.L.R. 688; [1970] 1 All ER 1094** it was held;

> *"Over a long period of years, it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases".*

In the case of ***Walters v Sunday Pictorial Newspapers Limited [1961] 2 All ER 761*** *it was held:*

> *"It is well established that the drastic remedy of striking out a pleading or, part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to, discloses no arguable case. Indeed, it has been conceded before us that the Rule is applicable only in plain and obvious cases".*

10. In **Narawa v Native Land Trust Board [2003] FJHC 302; HBC0232d.1995s (11 July 2003)** the court made the flowing observations:

> *"In the context of this case, I find the following statement of Megarry V.C. in Gleeson v J. Wippell & Co. [1971] 1 W.L.R. 510 at 518 apt:*
> *First, there is the well-settled requirement that the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt. Second, Zeiss No. 3 [1970] Ch. 506 established that, as had previously been assumed, the jurisdiction under the rules is discretionary; even if the matter is or may be res judicata, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial".*

11. The Summons before me by the Defendants states that the same is made pursuant to paragraphs (a), (b), (c) and (d) of the Rule 18 (1) of Order 18 of the HCR. The Affidavit evidence relied on by the Defendants will not play a role, if the Application is to be considered pursuant to Rule 18 (1) (a) of the Order 18 of HCR. Because no evidence is admissible when considering under paragraph (a). However, the Affidavit filed by the first named Defendant does not adduce any acceptable and/ or convincing reason/s warranting the intervention of Court under paragraphs (b), (c), or (d) of the Rule 18 (1)

to justify an order for the action to be struck out, stayed, dismissed or judgment to be entered accordingly, as the case may be.

12. In the Affidavit in opposition by the Defendant, there are various allegations against the Plaintiff to the effect that the Plaintiff has violated the conditions of the Sale and Purchase Agreement, which, in my view, require oral evidence and deep scrutiny at the trial. The stance taken by the Plaintiff in his Affidavit in support and the contents of the supporting documents attached thereto, though appear to be *prima- facie* convincing for the grant of injunctive reliefs, also need to be substantiated by oral evidence at the trial before proceeding to strike out or dismiss at this stage, as moved for by the defendants.

13. One of the allegation levelled against the Plaintiff by the Defendants is that the action has been filed relying on an Agreement, which has already been terminated. The question whether the Agreement was duly terminated or not has to be decided after the trial. This purported termination, of course, is unilateral by the Defendants. It is observed that the very Agreement has an inbuilt provision for the extension of the time by mutual agreement for the completion of the intended settlement and transfer.

14. The Defendant also alleges that the Plaintiff had not made the payments for the updating of the Insurance policy for the premises in suit, which the Defendant now appears to have paid as per "NKP 4", seemingly with an ulterior motive of pinning the blame on the Plaintiff to justify the unilateral termination. But, the careful perusal of the contents of the Agreement for Sale and Purchase, particularly, paragraph 5(b) and the special conditions under paragraph 18 thereof, clearly show that nowhere in the Agreement a clause or a single word about any insurance Policy or payments for renewal of it is embodied or mentioned.

    It is observed that, as far as payments of Electricity, Water, Telephone and payments like City Rates, are concerned, it has been clearly stated in the Agreement that such payments have to be settled and updated only by the time of final settlement and Transfer.

15. It appears that the Defendants having, purportedly, terminated the Agreement on their own volition and seemingly on unfounded allegations, now in an attempt to prevent the action by the Plaintiff, which is founded on paragraph 13 of the Agreement to Sale and Purchase. The propriety of the purported termination has to be fully gone into at the trial. It has to be also borne in mind that the Plaintiff, out of the total purchase price of $490,000.00, has paid 50% of it being $245,000.00, which is a substantial amount, and the Plaintiff, as per the Agreement, has also gone into the possession thereof. Further, the Plaintiff has, admittedly, effected improvements spending colossal sum of money, which was not a prohibited act for the Plaintiff as per the Agreement.

16. The Defendants in paragraph 6 of their Affidavit in opposition, in response to the paragraph 5 of the Plaintiff's Supporting Affidavit, finds fault with the Plaintiff for not annexing the Deed of Assignment from the second name plaintiff unto the first named

plaintiff. By this averment, the Defendants seem to be challenging the propriety of the action filed. However, the Plaintiff along with his Affidavit in reply has duly annexed the said Assignment as "CJK1".

17. Above all, the Defendant in paragraph 9 of his Affidavit in opposition, has admitted the contents of paragraph 9 of the Plaintiff's Affidavit in support, which was in relation to consent of the Housing Authority as embodied in clause 3 of the Agreement. It has been clearly agreed and understood by and between the parties that the property was a Housing Authority Lease and the Sale was subject to the consent of the Housing Authority. But, the Defendants now seem to be suppressing the issue of consent or soft-peddling on it. It appears to have been their duty to have swiftly moved and obtained the consent of the Authority before proceeding to the settlement as the plaintiff was, apparently, depending on it for the approval of the financing facility from his Bank.

18. Further, the obtaining of the Capital Gain Tax Certificate was also a pre-condition before proceeding to the settlement and transfer. It is alleged that the Defendants had failed to fulfill the task of obtaining the Certificate. Having conducted the affairs in the above manner, the Defendants have now taken up a position that they are prepared to go through the settlement on a fresh Agreement, with the new price of $345,000.00 and the already paid advance to be treated as damages. This prompts the Court to go into the matter and find out precisely as to the propriety of the purported repudiation and the forfeiture of $245,000.00 as damages from the Plaintiff. The allegations and counter allegations have to be gone into at the trial by calling oral evidence, without allowing the action to be struck out at this stage.

19. The substantial claim of the Plaintiff hereof is specific performance. In **Ronna Lynn Goldstien v Sat Narayan [HBC 413/01S by decision dated 9th July 2002 Pathik – J** stated

> *"A claim for specific performance raises important issues of facts and discloses reasonable cause of action. Thus application to strike out refused".*

20. *"A reasonable cause of action means a cause of action with some chance of success when only allegations in the pleadings are concerned. If once allegations are examined it is found that the alleged action is bound to fail the Statement of claim should be struck off".* The cause of action against D5 on duties of a consecutive trustee may appear weak but certain issues can be clarified by testimony of witness. The Court ought not to reach a conclusion on an interlocutory application: per Singh – J in **Rt Osea Raqica Tuinakelo v Director of Lands , Native Land Trust Board , Conservator of Forest , Attorney General and Fiji Hardwood Corporation Ltd [2003] HBC 303 / 02 S Ruling in January 2003.**

21. The Court will not strike out where the role of Court is to uphold the rule of law ; per Gates –J in **Chandrika Prasad v Republic of Fiji & Attorney General (No 4) (2000) 2 FLR 89 Judgment dated 15th November 2000.**

22. *"The first thing that the Court will do when faced with an application to strike out under Order 18 Rule 18 is to assume that each every one of the facts pleaded in the Statement of Claim is true and will be capable of proof at the trial . Once the assumption is made, the next step is to assess whether or not the pleaded facts do raise a reasonable cause of action"* ...... **Per Tuilevuka – J. M in Hemart Sharma v Deans Signs Ltd , Praveen Chazala Akbar , Nittya Nand t/a Premier Real Estate and Abinesh Ashish Chand [2011] HBC 108/06S Ruling dated 17th February 2011 at (4).**

23. For these reasons stated above, I find that the Application of the Defendants for striking out has no merits and liable to be struck out.

Application for Injunction Orders.

24. Admittedly, parties have entered into the Sale and Purchase Agreement marked as "CJK 2" on 6th December 2021 for the sale and Transfer of the subject matter land and premises for a total sum of $490,000.00 and the Plaintiff has already paid the part payment in a sum of $245,000.00 and taken the possession of the land and premises in terms of the Agreement. The balance sum of $245,000.00 was agreed to be paid at the time of settlement.

The Agreed period for the settlement and Transfer was 6 months from the date of execution of the Agreement, which was 6th December 2021 or on any other date to be mutually agreed between the parties in writing and for the Settlement to take place at the Registrar of Title's office as per clause 5 of the Agreement. The Plaintiff's Solicitors had in fact on 23rd June 2022 written to the Defendants' Daughter Ashana, in response to her mail dated 22nd June 2022 on the progress of the SPA and the Plaintiff's Solicitors had requested for further 90 days' time for the settlement. Vide "CJK 3". There was no any explicit term in the Agreement as to how and when the extension of time is to be sought.

It was in this background, the learned counsel for the Defendant by his letter dated 27th July 2022 marked as "CJK 4" purported to terminate the Agreement and demanded to pay the remaining sum of $245,000.00 immediately or make arrangement to vacate the land premises. I cannot understand as to why the learned Counsel is demanding the balance sum of $245,000.00, if the Defendants had already treated the Agreement as rescinded and/ or terminated.

It appears that the Defendants, who were under duty to obtain the consent from the Housing Authority and the Certificate of Capital Gain Tax, before the Settlement takes place, are now in an attempt to walk away from the Agreement with the view of enhancing the price by one Hundred Thousand Dollars as demanded in the Defendants' Solicitors' Letter dated 15th September 2022, marked as "CJK8".

25. The guide lines laid down by Lord Diplock in **American Cyanamid Co v Ethicon Ltd [1975] UKHL 1; [1975] AC 396** are still regarded as the leading source of the law of

injunction where it was held that in granting or refusing of interim injunction following guidelines can be taken into consideration:

(a) A serious question to be tried at the hearing of the substantive matter?
(b) Whether the damages are an adequate remedy?
(c) In whose favour the balance of convenience lie if the injunction is granted or refused?

26. In the case of **Cambridge Nutrition Ltd v BBC [1990] 3 All ER 523 at 534j Kerr L.J.** made the following observations;

> *It is important to bear in mind that the American Cyanamid case contains no principle of universal application. The only such principle is the statutory power of the court to grant inunctions when it is just and convenient to do so. The American Cyanamid case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone as a straightjacket.... The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolve by a trial.*

27. In **Hubbard & Another v Vosper & Another [1972] 2 Q.B. 84** Lord Denning said:

> *In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead. .... The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.*

28. Now the tussle between the parties hereof have boiled down to the material issues whether the unilateral repudiation of the Agreement by the Defendants, their demand for the balance sum when they have, purportedly, repudiated the Agreement , and their demand for the enhanced price are justified and warranted under the given circumstances. In my view, there are serious issues to be tried at the trial, with the injunction order being issued as prayed for to be in operation till the final decision of the substantive action.

29. The plaintiff is now in possession of the property by virtue of Agreement, after payment of 50% of the total Price. He has, admittedly, spent money on the improvement thereof. If the injunction orders are not granted, the plaintiffs will suffer irreparable damages. The awarding of damages will not be an adequate remedy for the Plaintiff. Therefore, the status quo will have to be preserved pending the final judgment after the trial.

30. On the other hand, the Defendants have already obtained 50% of the Sale price, which is $245,000.00 and at the end of the day, if they become victorious, the plaintiffs will

have the said amount forfeited in favor of the Defendants, who will also regain the property with added value and the possible enhanced market price. The Defendants have not so far filed their Statement of Defence and demonstrated the strength of their defence, as a result of which they are now facing the Summons for Interlocutory Judgment.

31. The test of balance of convenience, in my view, also favors the Plaintiff and if the application for injunction orders is turned down, serious prejudice will be caused to the Plaintiff, including the possible eviction, before the final adjudication of the matter.

32. For the reasons aforesaid the court makes the following orders.

A. The Defendants' Summons filed on 13th December 2022 seeking to strike out the Plaintiff's action is hereby dismissed.

B. The injunctive Orders sought by the Plaintiff, in terms of paragraphs 1, 2, and 3 of the Inter-partes Notice of Motion filed on 8th November 2022, are hereby granted.

C. There shall be summarily assessed costs of $ 1,500.00, on account of these proceedings, payable by the Defendants unto the plaintiff forthwith.

A.M. Mohamed Mackie
Judge

At High Court Lautoka this 3rd day of May, 2023.

SOLICITORS:
For the Plaintiff: **Messrs. Nambiar Lawyers, Barristers & Solicitors**
For the Defendants: **Sunil Kumar Esquire, Barrister & Solicitor**