IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 258 OF 2025

BETWEEN: **SERUPEPELI SOWANI** of 10 Reki Street, Suva, Retired.

First Plaintiff

AND: **SERUPEPELI SOWANI** as Executor and Trustee of the Estate of **OLIVE WHIPPY** also known as **OLIVE WHIPPY TUIVANUAVOU** late of Lot 166 Vavalagi Place, Nakasi, Nasinu in the Republic of Fiji, Domestic Duties, Deceased, Testate

Second Plaintiff

AND: **LITIANA MARAMA TUIVANUAVOU KANACAGI** also known as **LITIANA MARAMA** of Raiwaqa, Beautician as Executrix, Administrator and Trustee of the Estate of Ratu Luke Namarama Daligadua Tuivanuavou Nakanacagi also known as Luke Tuivanuavou Nakanacagi, late of 166 Vavalagi Place, Nakasi, Nasinu, Retired.

First Defendant

AND: **KARISITIANI TUIVANUAVOU** also known as **KARISITIANI NAKANACAGI** of Viseisei, Vuda, Technician being a beneficiary of the Estate of Ratu Luke Namarama Daligadua Tuivanuavou Nakanacagi also known as Luke Tuivanuavou Nakanacagi.

Second Defendant

AND: **MARIKA FRANK BANUVE NAKANACAGI** also known as **MARIKA NAKANACAGI** of Tamole Street, Newton being a beneficiary of the Estate of Ratu Luke Namarama Daligadua Tuivanuavou Nakanacagi also known as Luke Tuivanuavou Nakanacagi.

Third Defendant

AND **DIRECTOR OF LANDS** of Gladstone Road, Suva

Fourth Defendant

AND: **REGISTRAR OF TITLES** Ground Floor of Civic Towers, Victoria Parade, Suva.

Fifth Defendant

AND: **THE ATTORNEY-GENERAL OF FIJI,** of Suvavou House, Victoria Parade, Suva.

Sixth Defendant

RULING

(ON APPLICATION TO STRIKE OUT)

Coram:	*Penijamini R Lomaloma, Acting Puisne Judge*
Counsels:	
For the Plaintiffs:	*Mr. P. Kumar of Kumar Legal*
1st 2nd and 3rd Defendants:	*Mr. Faktaufon V & Faktaufon V of Vama Law*
4th 5th and 6th Defendants:	*Mr. K. Chand of the AG's Chambers*
Date of Hearing:	*6th October 2025*
Date of Ruling:	*15th October 2025*

Introduction

1. This is a summons by the Defendants to strike out the Writ and the Statement of Claim filed by the Plaintiffs on 22nd July 2025 in its entirety or such parts thereof the Honourable Court deems fit for the reason that this action by the Plaintiffs as privies is invalid under the principles of issue estoppel and extended doctrines of *res judicata* and in the face of consent order in Civil Action No. 197 of 2022 and the striking out order in Civil Action No. 354 of 2023 on the grounds that it is : -
    a. It is scandalous, frivolous and vexatious;
    b. It is an abuse of the process of the Court;

c. The Plaintiff's Writ of Summons and Statement of Claim be struck out against the Defendants as it discloses no cause of action and the Plaintiffs has no locus standi to suit the First, Second and Third Defendants;
d. There be a stay on the substantive action until the final determination of this application;
e. The Plaintiffs pay costs of this this application on an indemnity basis; and
f. Any further orders deemed just by this Honourable Court.

THE SUMMONS TO STRIKE OUT

2. The summons to strike out was filed on 18th of August 2025 and I set it down for hearing on 6th October 2025. The Defendant made the application pursuant to Order 18(1)(a)(b) and (d); Order 32 and Order 59 of the High Court Rules.

3. Order 18 (1) (a)(b)(d) of the High Court Rules states:-

Striking out pleadings and indorsements (O.18, r.18)

18.–(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, 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;

(b) it is scandalous, frivolous or vexatious;

(c) ….. 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.919

4. The Defendants supported their application with an affidavit sworn by LITIA MARAMA TUIVANUAVOU NAKANACAGI aka LITIA MARAMA who is the First Defendant being duly authorized by the 2nd and 3rd Defendants. I have decided to examine the ground in Order 18, Rule 18 (1)(a) first and will ignore the affidavit as Order 18, rule 18(2) makes an affidavit inadmissible when considering that ground.

5. I have addressed the first ground in detail as it is the key consideration in a striking out application and it will address the other grounds set out in the application.

6. The law on striking out is well settled. In ***National MBF Finance (Fiji) Ltd v Buli [2000] FJCA 28; ABU0057U.98S (6 JULY 2000),*** the Court of Appeal said;

> *"The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court".*

The Writ

7. The Plaintiffs have filed a writ claiming that the 1st to 3rd Defendants have been enriched at their expense; that the enrichment was unjust; and that the unjust factors are fraud and acquiescence by all three Defendants; and the Plaintiff claims restitution in the sum of $172,000 he spent to improve the property. They also claim damages but this is not a remedy in restitution. The Writ is on the record, and I will not repeat its contents. However, I will summarise it here for completeness.

8. The Defendants are the biological children of Ratu Luke Namarama Daligadua Tuivanuavou Nakanacagi also known as Luke Tuivanuavou Nakanacagi, late of 166 Vavalagi Place, Nakasi, Nasinu. Ratu Luke was the registered owner of Crown Lease, CL443700. Erected on the lease was a house that was in a dilapidated stage.

9. After the Defendants mother died, Ratu Luke married Olive Whippy on or about 13th February 1987 and they lived together in the house on CL 443700. Ratu Luke died in 2012.

10. Olive Whippy remained in the house after Ratu Luke passed away and developed a relationship and then married the Plaintiff. At the material time, the Plaintiff was working in the USA as a Caregiver.

11. The house was in a dilapidated stage and at a family meeting, Olive Whippy told the 2nd and 3rd Defendants who were adults at the time that it needed to be repaired and they should pay for the repairs, but they told her she should pay for the repairs as she was living there and they had their own families to support.

12. Olive Whippy asked the first Plaintiff to send money to make repairs and maintenance to the house and said that she would transfer the property to him upon her death. Based on this promise, the Plaintiff sent money to buy the materials and paid one Ratu Rusiate and one Ratu Joe who made the repairs to the house between 2014 and 2018 to the value of $172,000.00. As a result of the repairs and renovations, the value of the house increased substantially.

13. Uknown to Olive Whippy, Ratu Luke had left a Will dated 30th September 1999 which at the material time, was known to the 3rd Defendant but was not disclosed to Olive Whippy. At the time the repairs were being done, the 3 Defendants did not disclose to Olive Whippy or the Plaintiff that Ratu Luke had a Will and that she was not a beneficiary of the said Will. During the time the repairs and renovations were being done, all 3 Defendants visited the house and did not disclose the fact that their father had left a Will.

THE LAW

14. The basis of the Plaintiffs claim is in Restitution. In ***the Law of Restitution,*** Goff & Jones, Sweet & Maxwell, Fifth Edition, 1998, at page 1, the learned authors described the law of Restitution thus:

> The law of Restitution is the law relating to all claims, quasi-contractual or otherwise which are founded upon the principle of unjust enrichment. Restitutionary claims are to be found in equity as well as the law but the common law of quasi-contract is the most ancient and significant part of restitution and, restitution is more easily understood if approached through that topic.
>
> We understand Restitution to be that part of restitution that stems from the common *indebitatus* counts for *money had and received* and *for money paid* from *quantum meruit* and *quantum valebat* claims. The action for *money had and received* lay to recover money which the Plaintiff had paid to the Defendant on the ground that it had been paid under a mistake or compulsion, or for a consideration that had totally failed. By this action, the Plaintiff could also recover money which the Defendant had received from a third party…. The action also lay to recover money which the Defendant acquired from the Plaintiff by a tortious act; and, in the rare cases, where the Defendant had received money which the Plaintiff could identify as his own, at the time of receipt and for which the Defendant had not given consideration, the Plaintiff could assert his claim by means of this action.
>
> The ***action for money paid*** was the appropriate action when the Plaintiff's claim was in respect of money paid, not to the Defendant but to a third party, from which a Defendant had derived a benefit. Historically the Defendant had to show that the payment was made at the Defendant's request, but as we shall see that the law was prepared to "imply" such a request on certain occasions, in particular where

the payment was made under compulsion of law or in limited circumstances in the course of intervention in an emergency on the Defendant's behalf..

15. In their book, ***Cases and Materials on the Law of Restitution,*** Professor Andrew Burrows and Ewan McKendrick, Oxford University Press, 1997 said this at Chapter 1:

> In 1966, Goff & Jones published ***The Law of Restitution*** which attacked the traditional approach and sought **to demonstrate that there is a coherent and principled English law of restitution based on reversing unjust enrichment.** Their thesis slowly gained acceptance in academia and amongst practitioners and Judges, culminated in the House of Lords acceptance in 1991 in ***Lipkin Gorman v Karpnale [1992] 4 All ER 512 at 532, [1991] 2 AC 548 at 578.***

16. In that case, a solicitor stole trust funds and lost gambling at the casino. The casino did not know that the funds were stolen. The House of Lords, applying the law of restitution said that the casino had been enriched at the expense of the solicitor's clients. Because the funds were trust funds, the court used the equitable remedy of tracing to trace the funds to the casino and ordered them to repay the money less the winnings of the solicitor. The court said that the common law of tracing could apply also.

17. This is an important decision in the law of restitution as Lord Goff of Chieveley, who was the principal author of ***The Law of Restitution*** sat in the case and said that the defence of change of position is available in restitution claims. The title of the book has now been changed to "***The Law of Unjust Enrichment***. Justice Tuilevuka of the High Court of Fiji used this case in several cases as authority for that defence. [1]

Quasi Contract and the Implied Contract Theory

18. A lot of the cases for what were known as the old forms of action for moneys had and received, for services rendered (*quantum meruit*), for goods received (*quantum valebat*) etc were said to be based on an implied contract. The key decision that recognized and established the doctrine of the implied contract as the basis for recovery for unjust enrichment was the decision of the House of Lords in ***Sinclair v Brougham [1914] AC 398***, an English trusts law case, concerning the right of depositors to recover sums which were deposited (or loaned) to a building society under contracts of deposit which were beyond the powers of the building society and therefore ultra vires and void ab initio. The Depositors sued the Building Society and the House of Lords found that the depositors could not recover their moneys in *indebitatus assumpsit* for money had and received, based on unjust enrichment but could do so on an implied contract.

[1] Sea Joy Enterprises Group Ltd v Fantasy Company Fiji Ltd [2016] FJHC 581; HBC 92.2011 (28 June 2016); Petherick v Aussie Houses International Ltd [2018] /FJHC 293; HBC 129.2009 (16 Aprila 2018)

19. **That decision stood in the UK for 84 years until 1996 when it finally was overruled in the case of *Westdeutsche Landesbank Girozentrale -v- Islington London Borough Council [1996] 2 All ER 961 at 992*** where Lord Browne-Wilkinson said:

> [In Sinclair v Brougham] The House of Lords was unanimous in rejecting the claim by the ultra vires depositors to recover in quasi-contract on the basis of moneys had and received. In their view the claim in quasi-contract was based on an implied contract. To imply a contract to repay would be to imply a contract to exactly the same effect as the express ultra vires contract of loan. Any such implied contract would itself be void as being ultra vires.
>
> Subsequent developments in the law of restitution demonstrate that this reasoning is no longer sound. **The common law restitutionary claim is based not on implied contract but on unjust enrichment: in the circumstances the law imposes an obligation to repay rather than implying an entirely fictitious agreement to repay**: see Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd[2] [1942] 2 All ER 122 at 136–137, [1943] AC 32 at 63–64 per Lord Wright, Pavey & Matthews Pty Ltd v Paul (1987) 69 ALR 577 at 579, 583, 603, Lipkin Gorman (a firm) v Karpnale Ltd [1992] 4 All ER 512 at 532, [1991] 2 AC 548 at 578 and Woolwich Building Society v IRC (No 2) [1992] 3 All ER 737, [1993] AC 70. **In my judgment, your Lordships should now <u>unequivocally and finally reject the concept that the claim for moneys had and received is based on an implied contract. I would overrule Sinclair v Brougham on this point.</u>**
>
> It follows that in Sinclair v Brougham, the depositors should have had a personal claim to recover the moneys at law based on a total failure of consideration. (emphasis mine)

20. The other Law Lords agreed with Lord Browne-Wilkinson.

<u>Key cases in other jurisdictions</u>

21. In Australia, the book by Goff & Jones was quoted with approval in the case of ***Pavey & Matthews Pty Ltd v Paul (1987) 69 ALR 577*** where the High Court rejected the implied contract theory and recognized that in the law of restitution, **the law itself imposes on the Defendant an obligation to pay for a claim in quantum meruit for the value of the work done.** Pavey was a licensed builder and made an oral building contract with Mrs. Paul to renovate a cottage; this was paid for in part. Mrs. Paul refused to pay the balance and, when Pavey demanded it, Paul claimed the contract was unenforceable for failing to comply with a proviso of the *Builders Licensing Act* which required that, to be enforceable, a building contract must be in writing and signed. The High Court said on appeal that the contract was

unenforceable, but that Mrs. Paul had been unjustly enriched at the expense of the builder and ordered her to pay the balance of the enrichment.

22. Deane J (with whom Mason and Wilson JJ agreed said:

> ***[para 14]*** To identify the basis of such actions as restitution and not genuine agreement is not to assert a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate. ... That is not to deny the importance of the concept of unjust enrichment in the law of this country. **It constitutes a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a Defendant to make fair and just restitution for a benefit derived at the expense of a Plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case ...**. In a category of case where the law recognizes an obligation to pay a reasonable remuneration or compensation for a benefit actually or constructively accepted, the general concept of restitution or unjust enrichment is ... also relevant, in a more direct sense, to the identification of the proper basis upon which the quantum of remuneration or compensation should be ascertained in that particular category of case.

23. The case of ***Pavey & Matthews Pty Ltd v Paul (1987) 69 ALR 577*** is relevant to the case before me as the facts are similar and the cause of action is based on *quantum valeba*t for the material supplied to make improvements and *quantum meruit* for the labour used and paid for by the First Plaintiff.

24. Restitution is available only **in some cases of unjust enrichment which have been recognized in the decided cases by the superior courts in common law** such as *quantum meruit,* or *quantum valebat* or *for moneys had and received* etc. Not every enrichment can trigger restitution.

Restitution in the UK

25. In the UK, the modern Law of restitution as postulated by Goff & Jones was recognized and applied for the first time by the House of Lords as a distinct area of the law in the case of ***Lipkin Gorman (a firm) v Karpnale Ltd [1992] 4 All ER 512 at 532, [1991] 2 AC 548 at 578*** where the law itself imposes an obligation to repay rather than implying an entirely fictitious agreement to repay.

The Old Common Law Forms of Action

26. A lot of the of the causes of action in restitution still use the names used in the old English common forms of action. Until 1852 in England, one had to initiate an action by filing one of the old forms of action which required specific procedures for bringing legal claims before the courts. Each form of action involved a unique set of procedures, pleading, trial,

and judgment. These forms were abolished in the *Common Law Procedure Act 1852*, and thereafter, the common actions that fall within the scope of the old actions for *money had and received*, or *for money paid,* or *of quantum meruit* or *quantum valebat claims* which were founded on the principle of unjust enrichment were grouped together as **quasi-contractual claims founded on an implied contract by the Defendant to pay to the Plaintiff money paid to him**.[3] I have started here as the judgments, books, essays and academic writings are replete with the names of these old forms of actions.

The Implied Contract Theory

27. The implied contract theory was applied in the case of ***Sinclair v Brougham [1914] AC 398***, an English trusts law case, concerning the right of depositors to recover sums which were deposited (or loaned) to a building society under contracts of deposit which were beyond the powers of the building society and therefore ultra vires and void ab initio. The Depositors sued the Building Society and the House of Lords found that the depositors could not recover their moneys in *indebitatus assumpsit* for money had and received, based on unjust enrichment but could do so on an implied contract.

Sinclair v Brougham Overruled

28. The implied contract theory as applied in ***Sinclair v Brougham [1914] AC 398*** was finally overruled by the House of Lords 84 years later in the case of ***Westdeutsche Landesbank Girozentrale -v- Islington London Borough Council [1996] 2 All ER 961 at 992*** where Lord Browne-Wilkinson said:

> *[In Sinclair v Brougham]The House of Lords was unanimous in rejecting the claim by the ultra vires depositors to recover in quasi-contract on the basis of moneys had and received. In their view the claim in quasi-contract was based on an implied contract. To imply a contract to repay would be to imply a contract to exactly the same effect as the express ultra vires contract of loan. Any such implied contract would itself be void as being ultra vires.*
>
> *Subsequent developments in the law of restitution demonstrate that this reasoning is no longer sound.* ***The common law restitutionary claim is based not on implied contract but on unjust enrichment: in the circumstances the law imposes an obligation to repay rather than implying an entirely fictitious agreement to repay****: see Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd[4] [1942] 2 All ER 122 at 136–137, [1943] AC 32 at 63–64 per Lord Wright, Pavey & Matthews Pty Ltd v Paul (1987) 69 ALR 577 at 579, 583, 603, Lipkin Gorman (a firm) v Karpnale Ltd [1992] 4 All ER 512 at 532, [1991] 2 AC 548 at 578 and Woolwich Building Society v IRC (No 2) [1992] 3 All ER 737, [1993] AC 70.* ***In my judgment, your Lordships should now unequivocally and finally reject the concept that the claim for***

[3] The *Law of Restitution*, Goff & Jones, Sweet & Maxwell, London, Fifth Edition, 1998, at pages-4 to 6

moneys had and received is based on an implied contract. I would overrule Sinclair v Brougham on this point.

It follows that in Sinclair v Brougham, the depositors should have had a personal claim to recover the moneys at law based on a total failure of consideration.

29. A lot of the cases quoted above have been applied by the courts in Fiji but none have recognized the unifying theory of the law of restitution that is discussed in the book by Goff & Jones. ***Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1942]***[5] was applied by Fatiaki J (as he then was) in ***Sakashita v Concave Investment Ltd [1999]***[6]***. Pavey & Matthews Pty Ltd v Paul (1987)*** [7]***referred to in Akhtar v Gonzalez (Majority Judgment) [2002]*** [8]

30. The implied contract theory was overruled by the High Court of Australia in the case of ***Pavey & Matthews Pty Ltd v Paul [1987] HCA 5; (1987) 162 CLR 221.*** Five years later, the House of Lords recognized the law of restitution as a separate branch of jurisprudence in the case of ***Lipkin Gorman (a firm) v Karpnale Ltd [1992] 4 All ER 512 at 532, [1991] 2 AC 548.***

Other Jurisdictions

31. In Canada, the implied contract theory was rejected by the Supreme Court of Canada in ***Deglman v Guaranty Trust Co. of Canada [1954] S.C.R. 725.***

32. In New Zealand, Palmer J of the High Court of New Zealand tracing the status of the matter in New Zealand said:

[77] Courts in most common law jurisdictions have espoused, with varying levels of enthusiasm, the notion that quantum meruit and other aspects of restitution law are founded on the concept of unjust enrichment. But Professor Birks himself was aware that a remedy of restitution is triggered by events other than unjust enrichment.155 There has been a resurgence of academic commentary criticising the equation of restitution law and unjust enrichment.156 And New Zealand courts have not joined so enthusiastically with other jurisdictions' embrace of unjust enrichment as a unifying doctrinal foundation. We have risen to the challenge recently posed by Gagelaar J in the Australian High Court, of resisting "the temptation to intellectual gratification that accompanies any quest to portray cases in which the common law recognises an obligation of restitution as the conscious or unconscious application of one Very Big Idea".157 ***In characteristically***

[5]] 2 All ER 122
[6] FJLawRp 18; [1999] 45 FLR 13 (5 February 1999)
[7] 69 ALR 577 at 579, 583, 603
[8] FJCA 24; ABU0054.1998S, ABU0063.1998S, ABU0068.1998S (30 August 2002).

pragmatic New Zealand fashion, we have generally resisted the embrace of unjust enrichment as a unifying doctrinal foundation for quantum meruit, in favour of identifying its more precise elements.

33. In Trinidad and Tobago, the Privy Council recognized the modern law of restation in the case ***Attorney General of Trinidad and Tobago v Trinsalvage Enterprises Ltd (Trinidad & Tobago) [2023] UKPC 26 (18 July 2023).***

ANALYSIS

34. The law of restitution has the following elements which the Plaintiff must prove on the balance of probabilities at the trial:

    a. The Defendant was enriched;
    b. At the expense of the Plaintiff;
    c. The enrichment was unjust; and
    d. There are no defences.

35. At this stage when an application is made to strike out, the court needs only to assume that every matter in the statement of claim can be proved at the trial and see each legal issue can be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a case. From the Writ whether the Plaintiffs can prove on the balance of probabilities all the elements above are issues that require the matter to go to trial. The one issue that binds the whole claim together if proved is the issue of tracing.

36. There are two types of tracing—common law tracing and equitable tracing. In ***Lipkin Gorman (a firm) v Karpnale Ltd [1992] 4 All ER 512 at 532, [1991] 2 AC 548,*** the House of Lords used the equitable remedy of tracing to trace trust the funds stolen by the solicitor to the Casino. In the case before me, the Plaintiffs need to trace the funds from the Plaintiff to the Defendants. This is a live issue of law that requires that this matter should go to trial.

Tracing

37. In the case before me, if we assume that all the matters in the pleading can be proved, then the Plaintiffs have a strong case but it all depends on the string that hold everything together—whether the Plaintiff's can trace the funds from the First Plaintiff to each of the defendants. That is an issue that can only be settled at a trial. There is common law and equitable tracing and each have their limitations.

Defences

38. There are defences available in the law of restitution such as illegality, change of position, estoppel, In ***Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548, [1992] 4 All ER 512,*** Lord Goff said of the defence:

I am most anxious that, in recognizing this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case by case basis, in the usual way.

39. There are defences like change of position[9], estoppel, bona fide purchase, available in the law of restitution but this is to be considered at the trial when the defence is filed and evidence presented. None of the Defendants have filed their defence yet.

Res Judicata

40. The Defendants claim that this matter has been struck out in several cases by other courts before me. I have examined the cases but they were not filed in restitution. In the eviction proceeding, applicable law was the Land Transfer Act. In HBC 354 of 2023, the facts were the same. The Master in his ruling to strike out said:-

[34] Plaintiff in the Statement of Claim has not claimed that the defendants at any point of time promised the plaintiff and/or the late Olive Whippy any interest in the estate of Ratu Luke Namarama Daligadua Tuivanuavou Nakanacagi, nor has encouraged and/or invited the plaintiff and/or the late Olive Whippy to do renovations or upgrade to the property.at Lot 166 Vavalagi Place, Nakasi, Nasinuwhich is part and parcel of the estate of the late Ratu Luke Namarama Daligadua Tuivanuavou Nakamacagi.

[35] It is therefore apparent that the alleged claim of the plaintiff relates to monies allegedly spent on renovations and upgrade of a property that plaintiff and/or the late Olive Whippy had no legal interest in. Whereas, it is clear that the plaintiff has no locus standi to bring this action and also there is no reasonable cause of action disclosed by the plaintiff in this action against the defendants.

41. The Master did not consider the process or remedy of tracing in the case. He struck the matter out and so the issue of tracing was never determined in a trial, so it is a live issue. The facts stated above is one of unjust enrichment and the process or remedy of tracing that I have discussed above in the case of ***Lipkin Gorman v Karpnale Ltd (supra)*** was never raised before the Master or at the appeal. I would therefore consider the decisions not binding on me as they are per incuriam. A matter that is struck out can be re-instated or filed afresh.[10]

[9] Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548, [1992] 4 All ER 512

[10] See DECISIONS PER INCURIAM By G. W. P ATON, B.O.L. (Oxon), M.A. (Melb.). Professor of Jurisprudence in the University of Melbourne.

FINDING

1. I find, for the reasons given, that the Plaintiffs case is not scandalous, frivolous, vexatious; or an abuse of the process of the Court.

2. Further, I find that the striking out of similar cases in the High Court do not constitute res judicata as they did not consider the law of restitution and the law of tracing.

3. The Plaintiffs have a case that should go to trial.

Orders

1. The application to strike out is dismissed.

2. Costs summarily assessed at $1,000 to be paid to the Plaintiff within 21 days from the date of this Ruling.

.....

Penijamini R Lomaloma

Acting Puisne Judge

HIGH COURT OF FIJI

SUVA