

IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 131 of 2022

BETWEEN **BADRUL NISHA RAFIQ** of Martintar, Nadi.

PLAINTIFF

AND **B W HOLDINGS LIMITED** a Limited Liability Company having its
registered office at Nakasi, Nasinu, Fiji.

1ST DEFENDANT

AND **SHERANI & CO** a private law firm having its office at 2nd Floor,
Harifam Centre, Greig Street, Suva.

2ND DEFENDANT

BEFORE **Master P. Prasad**

Counsel for Plaintiff: Mr. A. Achal

Counsel for Defendants: Mr. R. Singh

RULING

(Strike out)

1. The Plaintiff brings this action against the Defendants for specific performance of a Sale & Purchase Agreement made on 10 August 1994.
2. The Plaintiff through her Statement of Claim (**Claim**) states as follows:
 - a. The Plaintiff had a business namely Kabaish Business Forms (**KBF**).
 - b. On 10 August 1994, the Plaintiff and the 1st Defendant entered into two separate agreements:
 - i. Agreement for sale of shares in KBF from the Plaintiff to the 1st Defendant in the sum of \$90,000.00 (**Share Agreement**); and
 - ii. Sale & Purchase Agreement for "*purchase of Lot 86 according to scheme plan subdivision*" from the 1st Defendant to the Plaintiff for a consideration of \$70,000.00 (**S&P**).
 - c. Both the Share Agreement and the S&P were dated 10 August 1994.
 - d. The 2nd Defendant acted as common solicitor for both parties.
 - e. The 2nd Defendant paid \$20,000.00 as a deposit for the Share Agreement. The outstanding amount for the same was \$70,000.00.
 - f. Parties agreed verbally that without having to pay each other the balance \$70,000.00 for the respective agreements, they would swap the shares

in KBF with the parcel of land being Lot 86 on scheme plan (**subject land**).

- g. Plaintiff transferred the shares in KBF witnessed by the 2nd Defendant.
- h. At the time of entering into the agreements, the 1st Defendant was in the process of subdividing land belonging to it.
- i. On 01 March 1995, the 1st Defendant through the 2nd Defendant wrote to the Plaintiff informing her that the transfer would be completed upon the completion of the subdivisions and scheme plan.
- j. After 10 years in 2004 the Plaintiff made enquiries requesting the 1st Defendant to fulfil its obligations under the S&P. The 1st Defendant's directors informed the Plaintiff that there were some offshore licencing issues pending.
- k. The Plaintiff is of old age and misplaced the S&P, which was then discovered by her son in 2021.
- l. The Plaintiff then took action for the performance of the S&P.
- m. When the Defendants failed to respond then the Plaintiff sent a Demand Notice on 31 August 2021.
- n. The 1st Defendant has failed to honour the S&P.
- o. The 2nd Defendant breached his duty of care in representing both the Plaintiff and 1st Defendant and caused loss to the Plaintiff.

3. The Plaintiff then claims the following reliefs:

- a. An order for specific performance of the S&P.
- b. An order in the alternative for compensation and damages to the value of the land.
- c. The Defendants jointly and severally pay general damages and punitive damages.
- d. Interest of 10% under Law Reform (Miscellaneous Provisions) (Death and Interest) Act from the 01 August 1994 until full and final payment.
- e. Costs on solicitor client indemnity basis.
- f. Other remedies the court deems and expedient.

4. On 04 August 2022, the Defendants filed a Summons to strike out the Plaintiff's Claim pursuant to Order 18 Rule 18 (1) (a), (b), (c), and (d) of the High Court Rules (**HCR**) and Sections 4 of the Limitation Act 1971 (**Summons**). In support of the Summons the Defendants filed respective Affidavits of one Narendra Kumar, Director of the 1st Defendant company and of Hemendra Nagin, Managing Partner of the 2nd Defendant law firm.

5. Narendra Kumar's Affidavit in Support states as follows:

- a. Clause 2 of the S&P stated that the sale of the subject land was subject to the Director of Lands (**DOL**) consent. The same was not obtained rendering the S&P unlawful, unenforceable and void.
- b. There was no consent obtained before entering the S&P.

- c. The Plaintiff has not taken any steps since 1994 and only sent a Demand Notice after 27 years on 31 August 2021.
- d. On 06 September 2021, the 2nd Defendant responded to the Demand Notice and on 20 September 2021, the Plaintiff's solicitors responded via email wherein they attached a copy of the S&P.
- e. On 23 September 2021, the 2nd Defendant responded advising the Plaintiff's solicitor that the S&P was not valid as the consent of the Director of Lands had not been obtained.
- f. The 1st Defendant does not have records for 1994 and will suffer great prejudice having to defend the Plaintiff's Claim.
- g. The 1st Defendant cannot be expected to keep records for the last 28 years.

6. Hemendra Nagin's Affidavit in Support states as follows:

- a. The 2nd Defendant does not have any records or documents from 1994 and the Plaintiff cannot expect the 2nd Defendant to keep records from 28 years ago.
- b. The 2nd Defendant is now differently constituted and has different partners and the partner who handled the S&P transaction is no longer with the 2nd Defendant.
- c. The Plaintiff's Claim is statute barred under the Limitation Act 1971 and is frivolous, vexatious and an abuse of the court process.

7. The Plaintiff opposed the Summons and filed two Affidavits in Opposition deposed by one Aiyaz Rafiq, the Plaintiff's son and Attorney acting under a Power of Attorney of the Plaintiff in response to both the Supporting Affidavits of the Defendants. The said Affidavits in Opposition state as follows:

- a. In response to the 1st Defendant's Affidavit in Opposition:
 - i. The Plaintiff has no control over the Department of Lands and the subject land was reclaimed land.
 - ii. The 1st Defendant had advised that the subject land was in the process of subdivision.
 - iii. It was the 1st Defendant's duty to obtain the DOL's consent.
 - iv. The Plaintiff's husband has been in constant contact with the 1st Defendant and after a lapse of 10 years the Plaintiff is still waiting for the 1st Defendant to perform the S&P.
 - v. The Plaintiff has taken required steps for the last 28 years.
 - vi. Plaintiff is very old and has paid the full purchase price.
 - vii. The Plaintiff was not sleeping on her rights and repeatedly visited the 1st Defendant to enquire about the progress.
 - viii. The Defendants were obliged to take the DOL's consent.
 - ix. The 1st Defendant did have a copy of the S&P.
- b. In response to the 2nd Defendant's Affidavit in Opposition:

- i. As managing partner, the said Hemendra Nagin should have knowledge regarding the S&P.
- ii. The Plaintiff believed in the 2nd Defendant for 10 years and further awaited response till date as the 2nd Defendant was the common solicitor.
- iii. The Plaintiff's Claim is not statute barred.

8. The Defendants filed respective reply affidavits sworn by Narendra Kumar and Hemendra Nagin stating as follows

a. Narendra Kumar's reply:

- i. The Plaintiff has not made any payments as per the S&P and shown no evidence that the same was paid.
- ii. The purchase price was to be paid on the date of settlement and the same did not eventuate.
- iii. The Plaintiff has never contacted the 1st Defendant since 1994.
- iv. There were no enquiries or communication from the Plaintiff in respect of the S&P.
- v. The Plaintiff has not taken any steps since 1994 and there has been inordinate and unexplained delay by the Plaintiff.
- vi. The Plaintiff has shown no evidence of any activity after signing the S&P.
- vii. Plaintiff showed no evidence that she made any effort to conclude the S&P.
- viii. The Plaintiff is guilty of *laches*.
- ix. The Plaintiff only made enquiries after 28 years.
- x. The 1st Defendant had no records of the S&P and only obtained a copy of the same from the Plaintiff's counsel *via* email on 20 September 2021.

b. Hemendra Nagin's reply:

- i. The transaction was handled in 1994 by another partner of the 2nd Defendant law firm who is no longer with the firm.
- ii. The 2nd Defendant had no knowledge of this matter and did not receive any enquiries from the Plaintiff on the same.
- iii. The S&P was subject to the DOL's consent and subject land was under subdivision.
- iv. The Plaintiff's Claim is statute barred.

9. Both parties made oral submissions at the hearing of the Summons and filed written submissions as well.

10. Although the Plaintiff's Summons was made pursuant to Order 18 Rule 18 of the HCR and section 4 of the Limitation Act 1971, during the hearing of the Summons, the counsel for the Defendants advised this Court that they were no longer relying on section 4 of the Limitation Act 1971. The Defendants' counsel

then submitted only on Order 18 Rule 18 and that the Plaintiff was guilty of laches.

11. Order 18 rule 18 provides:

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

(a) it discloses no reasonable case of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

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

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

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

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

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

Prosecutions [1973] 1 W.L.R. 1019; [1973] 2 All E.R. 935, C.A., as explained in *Ronex Properties Ltd v. John Laing Construction Ltd*, above).

[emphasis added]

15. The legal principles regarding striking out pleadings are clear and widely understood. The Court of Appeal in ***National MBF Finance v Buli*** [2000] FJCA 28 determined the principles for strike out. In ***Attorney-General v Shiu Prasad Halka*** 18 FLR 210 at 214 Justice Gould V.P. in his judgment expressed "*that the summary procedure under O.18, r.19 is to be sparingly used and is not appropriate to cases involving difficult and complicated questions of law.*"
16. It was held in ***Ratumaiyale v Native Land Trust Board*** [2000] FJLawRp 66; [2000] 1 FLR 284 (17 November 2000) that:

*"It is clear from the authorities that the Court's jurisdiction to strike out on the grounds of no reasonable cause of action is to be used sparingly and only where a cause of action is obviously 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 (***A-G v Shiu Prasad Halka*** [1972] 18 FLR 210; ***Bavadra v Attorney-General*** [1987] 3 PLR 95. The principles applicable were succinctly dealt by Justice Kirby in ***London v Commonwealth [No 2]*** 70 ALJR 541 at 544 - 545. These are worth repeating in full:*

1. *It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the Court, is rarely and sparingly provided (***General Street Industries Inc v Commissioner for Railways (NSW)*** [1964] HCA 69; (1964) 112 CLR 125 at 128f; ***Dyson v Attorney-General*** [1911] 1 KB 410 at 418).*
2. *To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action (***Munnings v Australian Government Solicitor*** (1994) 68 ALJR 169 at 171f, per Dawson J.) or is advancing a claim that is clearly frivolous or vexatious; (***Dey v. Victorian Railways Commissioners*** [1949] HCA 1; (1949) 78 CLR 62 at 91).*
3. *An opinion of the Court that a case appears weak and such that it is unlikely to succeed is not alone sufficient to warrant summary termination. (***Coe v The Commonwealth*** (1979) 53 ALJR 403; (1992) 30 NSWLR 1 at 5-7). Even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*
4. *Summary relief of the kind provided for by O 26, r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer. (***Coe v The Commonwealth*** (1979) 53 ALJR 403 at 409). If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the*

judicial mind to understand and apply the law that is invoked and to do so in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.

5. *If notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a court will ordinarily allow that party to reframe its pleadings. (Church of Scientology v Woodward [1982] HCA 78; (1980) 154 CLR 25 at 79). A question has arisen as to whether O 26 r 18 applies only part of a pleading. (Northern Land Council v The Commonwealth (1986) 161 CLR 1 at 8). However, it is unnecessary in this case to consider that question because the Commonwealth's attack was upon the entirety of Mr. Lindon's statement of claim; and*
6. *The guiding principle is, as stated in O 26, r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit”.*

[emphasis added]

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

18. The Plaintiff's Claim is one of specific performance and section 4(7) of the Limitation Act 1971 provides as follows in relation to the same:

(7) This section shall not apply to any claim for specific performance of a contract or for any injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as has, prior to the commencement of this Act, been applied.

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

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

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

The attitude of equity with regard to Statutes of Limitation and to a failure to pursue a remedy with expedition may, so far as contracts are concerned, be summarised in two propositions.

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

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

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

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

In the case of contracts the doctrine is well illustrated by an action for specific performance or for the rescission of a contract on the ground of misrepresentation. Those who seek specific performance of contracts must be unusually vigilant and active in asserting their rights, especially where the subject matter of the contract is one that fluctuates in value from day to day. ...

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

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

21. Halsbury's Laws of England (4th Ed) Vol. 16 explains the application of doctrine of laches in paragraph 1482, which reads as follows:

The practical application of the doctrine of laches depends upon the nature of the claim which it is sought to enforce. In ordinary cases of claims to enforce equitable rights, where it is not a case where staleness of demand would operate as a defence, the court looks for evidence of the circumstances which constitute laches, namely acquiescence by the plaintiff or change of position on the part of the defendant; and the plaintiff is not barred unless such evidence is given.

22. Spry's *Equitable Remedies* (6th Ed, Lawbook Co., 2001) at pages 225 and 226 discussed the doctrine of laches and stated:

The term "laches" has commonly been used in two senses. In the first sense laches refers simply to delay of the plaintiff in pursuing relief; and here it should be noted that delay by itself can no longer be thought to give

rise to an equitable defence. In the second sense, which is the only sense in which it is now relevant in courts of equity, laches refers to a position that the delay of the plaintiff in pursuing relief has brought about, and here it is the position caused by the delay, and especially its effect on the defendant himself, rather than the delay itself, which causes the court to deny relief.

...

Laches is established when two conditions are fulfilled. In the first place, there must be unreasonable delay in the commencement or prosecution of proceedings; in the second place, in all the circumstances the consequences of delay must render the grant of relief unjust.

23. Spry further discussed the general discretionary concept of laches on page 235 and stated:

It has been seen that a court with equitable jurisdiction, when it is deciding whether the defence of laches should prevail, enquires whether there has been, first, unreasonable delay by the plaintiff, and secondly, any consequent prejudice or detriment to the defendant or third persons in ordering specific performance. If these two matters are established, prima facie the plaintiff will fail. But he will fail only because in these circumstances it is ordinarily found to be unjust that he should succeed. It should not be forgotten that the real enquiry by the court relates to the "balance of justice or injustice in taking the one course or the other", that is, in the grant or refusal of relief.

24. Having regard to the foregoing principles, this Court now proceeds to examine the Plaintiff's pleadings. In her Claim, the Plaintiff states that on 01 March 1995 the 1st Defendant, through their common solicitors, informed her that the transfer would be completed once the subdivision and scheme plan were finalised. She further pleads that she made enquiries in 2004—ten years after the agreement of 10 August 1994—seeking performance of the 1st Defendant's obligations. She also states that due to her age she misplaced the relevant agreements, and that they were only rediscovered by her son in 2021, after which she took steps to pursue the matter.
25. The Defendants argue that these circumstances demonstrate that the Plaintiff slept on her rights and is therefore guilty of laches. The Defendants contend that they are prejudiced because they no longer possess records from 1994 and because the managing partner of the 2nd Defendant who handled the transaction is no longer with the firm.
26. Unfortunately, neither party has placed before this Court any evidence as to whether the subdivision of the subject land was ever completed, or whether the 1st Defendant still holds title to the land in question. Moreover, there is no evidence that the shares in KBF were indeed transferred from the Plaintiff to the 1st Defendant. These factual uncertainties are central to the assessment of delay and prejudice.
27. In light of the above, this Court accepts that the Defendants may ultimately be able to advance a defence of laches, and that this may weaken the Plaintiff's

case. Nevertheless, consistent with the principles in *Ratumaiyale* [supra] and *Coe* [supra], a mere possibility that a claim is weak or may not succeed *per se* is not a sufficient basis for striking it out summarily.

28. Whether the Plaintiff's delay was unreasonable, and whether such delay has caused any prejudice or detriment to the Defendants, are matters that must be determined at the substantive trial. The evidence available at this interlocutory stage is insufficient to make such findings.

29. Therefore, I make the following orders:

- a. The Defendants' Summons to Strike Out the Plaintiff's Claim is dismissed; and
- b. The Plaintiff is entitled to costs summarily assessed in the amount of \$1000.00, payable by the Defendants to the Plaintiff within 1 month.



P. Prasad
Master of the High Court

At Lautoka
05 March 2026