

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA

Civil Action No. HBC 88 of 2016

BETWEEN: **CHANDAR LOK** of Natabua, Lautoka, Retired Businessman

PLAINTIFF

AND: **THE DIRECTOR OF LANDS**

FIRST DEFENDANT

AND : **THE ATTORNEY GENERAL OF FIJI**

SECOND DEFENDANT

Appearance : Mr Mishra Prakash for plaintiff

Mr J Mainavolau for the defendants

Date of Hearing : 05 September 2016

Date of Ruling : 03 February 2017

R U L I N G

INTRODUCTION

[01] This is an application to strike out the claim.

[02] By their application filed on 20 July 2016 together with an affidavit sworn by Irena Nayacalevu (the Acting Chief Valuer in the Department of Lands and Survey) in support, the defendants seek an order that the Plaintiff's Claim against the first and the second Defendants (the defendants) be struck out on the grounds:

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

- (b) That 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.

[03] This application is made pursuant to Order 18 Rule 18(1) (a), (b), (c) & (d) of the High Court Rules 1988 ('HCR') and under the inherent jurisdiction of the Court.

[04] In opposition, the plaintiff filed an affidavit in reply.

[05] At the hearing, both parties verbally argued the matter. In addition, they also filed their respective written submission.

THE BACKGROUND

[06] The background facts are that: The Plaintiff's action arises from a Sale & Purchase Agreement entered into between the Director of Lands (First Defendant) and Ballaiya, the Plaintiff's late father ('the Agreement'). The agreement was executed on 7 January 1971. By that agreement, the First Defendant purchased from the Plaintiff's father 2 acres and 7 perches of lease no: 44656. The purchase was subject to payment of the value of the land, which was to be assessed, as compensation to the vendor. According to plaintiff, no compensation paid and survey plan was also not provided to him as agreed in the agreement.

[07] On 19 May 2016, the plaintiff, Chandar Lok filed the originating summons and asks determination of the court on the following questions:

1. *The First Defendant do give survey plans and/or registered survey plans for the area of two acres and seven perches covered by the First Defendant's Caveat No. 121064 against the Plaintiff's Native Lease No. 44656 on Lot 1 DP 1700 taken by the First Defendant*

pursuant sale and purchase agreement dated 7th January, 1971 within 10 days.

2. *An order that the First Defendant do pay the Plaintiff compensation agreed to be paid under agreement dated 7th January 1971 whereby the First Defendant 2 acres and 7 perches.*
3. *The First Defendant do pay compensation to the plaintiff in the sum of \$108,000.00 or as assessed by the Court.*
4. *The Defendants do pay damages to the Plaintiff for not giving him possession of the old road area for not providing him with proper registered survey plan and proper varied lease to him which has stopped him from enforcing his rights to full usage of the area he is entitled to.*
5. *Alternatively, that Caveat No. 121064 against Native Lease No. 44656 on Lot 1 DP 1700 do be removed.*
6. *The Defendants do pay the Plaintiff the costs of this action.*

THE LAW

[08] The application to strike out is made under Order 18 Rule 18 of the HCR, which so far as material states that:

“18 (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement if 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 that 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.*

DISCUSSION

- [09] The plaintiff has originated the action by way of originating summons. The power to strike out any pleading applies, so far as applicable, to an originating summons, and a petition as if the summons or petition were a pleading (O.18, r.18 (3)).
- [10] The defendants rely on all four grounds stipulated in rule 18 (1) of the HCR in their application to strike out the claim.
- [11] When the court considering an application under paragraph (a) that the pleading discloses no reasonable cause of action or defence, as the case may be, the evidence is not admissible. In that case, the court will only consider the pleadings.
- [12] The court is vested with jurisdiction to determine any claim or defence without trial under Order 18, Rule 18 of the HCR and under inherent jurisdiction. These powers are cumulative, not alternative, and may be invoked by the parties and employed by the court simultaneously.

[13] To begin with, I propose to deal with the ground that the claim is an abuse of the process of the court, a ground under paragraph (e).

[14] The court may dismiss an action on any of the grounds stated in Rule 18.

[15] The defendants strenuously and forcefully argue that the claim, if any, is caught by Limitation Act ('the Act'). They cite and rely on section 8 of the Act and submit that the plaintiff's action is founded upon the sale and purchase agreement that his father entered into with the first defendant in January 1971 in which the first defendant covenanted to do a proper survey and to pay compensation being the true value of the area. Since the cause of action arose on 7 January 1971, being the date of the agreement, the plaintiff had time until 7 January 1991 to bring his claim to the court. The plaintiff filed this action on 19 May 2016, about 45 years from the date of the agreement.

[16] Conversely, Mr Mishra counsel for the plaintiff argues that the defendant's plea of statute bar is based on section 8 (1) of the Limitation Act. That section applies to monies under mortgages or charges on the property. This is a different case. It is a contract for the sale of land which is secured under a caveat lodged by the first defendant. The transfer has not been presented to the plaintiff by the defendants. Once the agreed price is paid the plaintiff will then sign transfer. This can only happen if there is a proper registerable survey. He adds that presently a statute bar does not even begin to arise even if section 8 were to be applicable due to the defaults of the first defendant.

[17] Section 8 of the Act provides:

"S.8 (1) no action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, or to recover proceeds of the sale of land, after the expiration of twenty years from the date when the right to receive the money accrued."

[18] The above section bars an action to be brought to recover any principal sum of **money secured by a mortgage or other charge** or to recover **proceeds of the sale of land** after expiration of 20 years from the date when the right to receive the money accrued.

[19] The plaintiff's claim is based on a sale and purchase agreement, not on money secured by a mortgage or other charge or proceeds of sale. Therefore, Section 8 is not applicable to the plaintiff's case. The applicable provision to the plaintiff's case is section 4 of the Act, which so far as relevant, states:

*'4.-(1) The following **actions shall not be brought after the expiration of six years** from the date on which the cause of action accrued, that is to say-*

*(a) **actions founded on simple contract** or on tort;*

(b) actions to enforce a recognizance;

(c) actions to enforce an award, where the submission is not by an instrument under seal;

(d) actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:

...' (Emphasis provided)

[20] The Limitation Act applies to proceedings by or against the State in like manner as it applies to proceedings between subjects (**s.27 of the Act**).

[21] In this case, one of the parties to the agreement is the State (the Director of Land). Undoubtedly, the Limitation Act applies to the agreement the plaintiff's father entered into with the first defendant.

- [22] The court has the power to strike out even a valid claim where there has been an abuse of process, but it is not always correct to do so. Striking out should be the last option. If the abuse can be addressed in some less draconian way, it should be (*Reckitt Benckiser (UK) Ltd v Home Pairfum Ltd* [2004] EWHC 302 (Pat), [2004] FSR 37).
- [23] A claim that is issued after the expiry of limitation may be struck out as an abuse of process, albeit (alternatively) the limitation point may be determined as a preliminary issue, or at trial.
- [24] The plaintiff's claim is based on the agreement executed in 1971. Clearly, the action is founded on a simple contract. As it is an action founded on a simple contract, he should have brought the action within 6 years from the date on which the cause of action accrued (section 4 of the Limitation Act).
- [25] The cause of action for breach of the agreement arose in 1971. The plaintiff brought this action against the defendants on 19 May 2016, i.e., some 45 years after the contract was entered, and some 39 years after the expiration of the statutory time limit. The plaintiff's claim is manifestly statute barred.
- [26] I need to add that the defendants in their affidavit depose that, *the land in question was valued at \$733.50 as per valuation report dated 21 January 1971. The first defendant paid Mr Baliya the sum of \$730.00 as full and final settlement on 15 May 1972. Since Mr Baliya was bankrupt, payment was made to the Official Receiver and the Official Receiver, on behalf of Mr Baliya, had graciously accepted the offer of \$730.00 for the purchase of all lands (lot 1 & 2) in lease no: 44656 (Official Receipt No: 148685 is Marked as 'B' as proof of this payment.*
- [27] The plaintiff could not successfully deny the fact that the compensation was paid to the Official Receiver and the Official Receiver accepted the payment on behalf of Mr Baliya. Instead, he states that '*the Director of Lands had taken two acres and 7 perches for \$730.00 which was paid to*

the Official Receiver. From what Mr Baliya told me he did not receive any monies at all of the \$730.00 paid'.

[28] The plaintiff issued the claim 39 years after the expiry of limitation. He did not seek leave of the court to proceed with the claim out of time and he did not give any cogent reasons to persuade to grant such leave.

[29] In ***Senitiki Naqa v the Commander of RMR & Others*** (HBMN0063 of 2003), Singh J said that:

"The applicant is the one who is outside the time limits. It is for him to give cogent reasons to persuade the court to grant him the indulgence to pursue these proceedings out of time".

[30] The plaintiff appears to bolster a claim, which is statute barred some 39 years ago. The claim is filed without leave of the court to pursue it out of time. Without giving any reasons to persuade the court to grant him such leave, he simply blames the defendants for the delay. Since the claim is clearly statute barred, there is no point in allowing the limitation point to be determined as a preliminary issue or at trial, especially where the court could have a high degree of confidence that the claim would not succeed before striking it out. I have the high degree of confidence that the plaintiff's claim would not succeed. The plaintiff has issued a claim after the expiry of limitation. I, therefore, would strike out the claim as it is an abuse of the court's process. I would order the plaintiff to pay costs of \$500.00, which is summarily assessed, to the defendants.

[31] As I have determined to strike out the plaintiff's claim on the ground that it is an abuse of the process of the court, I do not intend to consider other grounds.

[32] I do not wish to make any order on the alternative claim that Caveat No.121064 against Native Lease No.44656 on Lot 1 DP 1700 to be removed, for the plaintiff could apply for the removal of the Caveat to the Registrar of Titles.

The Outcome

1. The plaintiff's claim is struck out and dismissed.
2. The plaintiff will pay summarily assessed costs of \$500.00 to the defendants.

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M H Mohamed Ajmeer

JUDGE



At Lautoka

03 February 2017