

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

Civil Action HBC 201 of 2010

**BETWEEN** : **ANIL SABHARWAL** of Varoka, Ba, Fiji Consultant.

**Plaintiff**

**AND** : **VIJAY PRASAD** of Uluisila, Sigatoka, Land Owner.

**Defendant**

Solicitors : Nacolawa & Co. for the Plaintiff  
Sherani & Co for the Defendant

## **R U L I N G**

### **INTRODUCTION**

1. The defendant applies under Order 18 Rule 18 of the High Court Rules 1988 and on the inherent jurisdiction of the Court to strike out the plaintiff's statement of claim against it on the following grounds:
  - (i) It discloses no reasonable cause of action or defence,
  - (ii) It is scandalous, frivolous and vexatious
  - (iii) It is an abuse of process.

### **BACKGROUND**

2. The plaintiff sues the defendant pursuant to an Agreement he alleges was entered into by him and the defendant on 01 June 2005. Basically, what he alleges is that he and the defendant had entered into an agreement by which the defendant engaged the plaintiff to sell some property of the defendant, for the defendant, for a commission.
3. By that agreement, the defendant had given the plaintiff:

“.....authority to sell the said land on an exclusive basis on the commission of 25% inclusive of the purchase price”.
4. The land in question is described as CT 28084 being Lot 1 D.P. 5179 known as Malaqereqere (Part Of) an undeveloped grazing land.
5. The plaintiff also pleads in paragraph 5 of his statement of claim that:

“....the Defendant further agreed earlier on the same date referred to in paragraph 4 above that the Defendant would transfer 6 ½ acres of the said land to the plaintiff in consideration of the plaintiff giving more time and resources on selling his property and forego other land dealings”



6. It is not clear from the statement of claim what the total acreage of the land is. However, at paragraphs 6 to 13 of the amended statement of claim, the plaintiff pleads:

6. ....the plaintiff had found one Ken McDonald to buy the 40 acres of the sand land.
7. THAT as a result on the 31<sup>st</sup> day of May 2005 the defendant gave a written authority to one Rony Chan of Quality Development Consultancy Limited to have the said land subdivided to have 6.5 acres transferred to the plaintiff.
8. THE Plaintiff had found other purchasers of the 40 acres of the said land.
9. TO ensure that the Defendant does not resile from the said exclusive authority to him to have 40 acres of the said land to be sold on 1<sup>st</sup> day of June, 2005 the Defendant agree to sell the 6 ½ acres of the said land to the plaintiff for \$10.00 and the Plaintiff paid the \$10.00 to the Defendant on 1<sup>st</sup> day of June, 2005 and the defendant Acknowledge the Agreement in the written Agreement dated 1<sup>st</sup> day of June, 2005.
10. ACCORDINGLY to protect his interest the plaintiff had the Caveat Number 568477 registered on the Certificate of Title Number 28084 ("The said Caveat).
11. THE Defendant through his Solicitor Messers Sherani & Company on the 1<sup>st</sup> day of October got the Registrar of Titles to have the said caveat removed.
12. THE Defendant refuses to have the said 6 ½ acres of the said land to be transferred to the plaintiff.
13. THE plaintiff is suffering loss and damage as a result of the breach of Agreement by the Defendant.

### **DEFENDANT'S AFFIDAVIT IN SUPPORT**

7. The defendant in his affidavit in support which he swore on 03 July 2012 deposes at paragraphs 5 to 16 as follows:

5. ...on the 29<sup>th</sup> November, 2010 the Court ordered that the Statement of Defence to be filed by 15<sup>th</sup> January, 2011, status quo to remain until further order of the court, the Plaintiff to file Reply to Defence by 10<sup>th</sup> February, 2011 and the matter was adjourned to 10<sup>th</sup> February, 2011 for mention to fix hearing date on the Summons. The Statement of Defence and Counter-Claim was filed and served on the 3<sup>rd</sup> February 2011. On the 10<sup>th</sup> February, 2011 the Court ordered the Plaintiff to file Reply to Defence by 28<sup>th</sup> February, 2011 and adjourned the matter to 02<sup>nd</sup> March, 2011 for mention before the Master for further steps.
6. That subsequently this matter had been adjourned on few occasions for the Plaintiff to file Reply to Defence and Defence to Counter-Claim until the Plaintiff filed a Notice of Change of Solicitors on the 24<sup>th</sup> August, 2011 through Solicitors Nacolawa & Co. The Plaintiff through its new Solicitors after 2 months filed a Summons to Amend the Statement of Claim on the 4<sup>th</sup> October, 2010 which was returnable on the 7<sup>th</sup> October, 2011 and was heard by the Master Mr. Anare Tuilevuka on the 02<sup>nd</sup> February, 2012.
7. On 2<sup>nd</sup> February, 2012 the Master allowed the Plaintiff's application to amend the Statement of Defence and thereafter matter to take is normal cause. The Amended Statement of Claim was filed on the 08<sup>th</sup> February, 2012 wherein the amendments were very identical to the initial claim. The amended Statement of Defence was



- filed on 23<sup>rd</sup> February, 2012 and the Plaintiff filed its Reply to Amended Statement of Defence on 20<sup>th</sup> March, 2012. No summons for Directions was filed when the matter was called before the Master on the 4th June, 2012. The Defendants objected to further time being given to file the Summons for Directions and the matter was adjourned to 3<sup>rd</sup> of July 2012 for the Plaintiff to file any necessary applications to strike out the claim.
8. The Plaintiff had initially filed a claim against my son, Vimal Chaudhary being Lautoka High Court Civil Action No. 300 of 2005, between Anil Sabharwal and Vimal Chaudhary. In that action as well, the Plaintiff had merely filed the claim against my son as he was the registered proprietor but in principal he was bringing the claim against me as the Attorney for my son. The Plaintiff placed a caveat against my son and my properties on 6<sup>th</sup> July 2005, as follows:
    - a. Caveat on CT 28084 Lot 1 which is under my name.
    - b. Caveat on CT 19065 Lot 13 which was owned by Vimal Chaudhary (my son) and Suruj Nath.
    - c. Caveat on CT 19058 Lot 14 which was under my son, Vimal Chaudhary's name.
  9. We applied for Caveat removal for CT19058 Lot 14, on 17<sup>th</sup> August 2005 but the Plaintiff was able to file an Ex-parte Motion in Court through Lautoka High Court Civil Action No. 300 of 2005, between Anil Sabharwal and Vimal Chaudhary and on 25<sup>th</sup> October 2005, he was able to get an ex parte order to have his Caveat extended until further order of the Court.
  10. The Plaintiff in Lautoka High Court Civil Action No. 300 of 2005, between Anil Sabharwal and Vimal Chaudhary, relied on an Offer to sell dated 3<sup>rd</sup> May 2005 between himself and me, with a purported revised agreement dated 8<sup>th</sup> June 2005, for specific performance of the Contract. **We filed a counterclaim and raised allegations of fraud against the Defendant. The Plaintiff sat with his ex-parte orders of 25<sup>th</sup> October 2005 and did not proceed to have his claim heard. The Trial was fixed for the 12<sup>th</sup> of April 2010 and there was no appearance by the Plaintiff or his Counsel. The Plaintiff's Claim was dismissed and struck out. Annexed hereto and marked as "VPC-1" is a copy of the Order made on 12<sup>th</sup> April 2010.**
  11. The Plaintiff was not able to successfully prosecute his Claim in Civil Action No. 300 of 2005. We soon applied for a removal of Caveat over CT 28084 Lot 1 on 27<sup>th</sup> May 2010. The Plaintiff must have become aware of the said application for removal and once again he proceeded with an Ex-parte Application (this action) to seek an order for extension of Caveat over CT 28084 Lot 1.
  12. However by the time the Registrar of Titles would have become aware of the Ex-Parte Order, it cancelled the Plaintiff's caveat No. 732368 over CT 28084 Lot 1. The Plaintiff's Ex-Parte Order was never noted on over CT 28084 Lot 1, as was evident from the search conducted on 2<sup>nd</sup> November 2010, annexed hereto marked as "VPC 2".
  13. Subsequently, today when my lawyers conducted a Title search, it shows that the Registrar of Titles has noted the Court Orders on the Title at a date after the 2<sup>nd</sup> November 2010, but entered it on the Title as 19<sup>th</sup> October 2010, which in itself is questionable. A search done by my lawyer's office on 2<sup>nd</sup> November 2010 did not reveal any Court Order but a search done today, 2<sup>nd</sup> July 2012, shows a Court Order endorsed on 19<sup>th</sup> October 2010. Annexed hereto and marked as "VPC 3" is a copy of the title search carried out on 2<sup>nd</sup> July 2012.
  14. The Plaintiff has in this action, once again:
    - a. Relied on an Agreement for 1<sup>st</sup> June 2005 (which was also pleaded in Civil



- b. Action No. 300 of 2005. Filed this action only after being made aware of an application to remove the Caveat over CT 28084 Lot 1, by me, just like he did in Civil Action No. 300 of 2005.
  - c. Obtained Ex-Parte Orders for extension of Caveat, just like he did in Civil Action No. 300 of 2005.
  - d. Brought proceedings against me, relying on fraudulent agreement and alterations.
15. The Plaintiff is seeking similar if not the same reliefs, in this action, as he did in Civil Action No. 300 of 2005. In both actions, the complaint the Plaintiff has is against me, and refers to an Authority to Sell between us, which I deny is in its original form and has been amended and altered to suit the Plaintiff's interests.
16. The Plaintiff has now filed a third High Court action against me being High Court Civil Action No. 105 of 2012 and once again he has relied on a purported Agreement dated 1<sup>st</sup> June 2005, which he is relying on in this case, and also relied on in Civil Action No. 300 of 2005. This is an abuse of the Court Process.

## THE LAW

### *No Reasonable Cause of Action*

8. The Courts rarely will strike out a proceeding on this ground. It is only in exceptional cases where, on the pleaded facts, the plaintiff could not succeed as a matter of law or where the cause of action is so clearly untenable that it cannot possibly succeed will the courts act to strike out a claim.
9. If the facts as pleaded do raise legal questions of importance, or a triable issue of fact on which the rights of the parties depend, the courts will not strike out the claim. (as per Mr. Justice Kirby in **Len Lindon -v- The Commonwealth of Australia** (No. 2) S. 96/005 )

### *Scandalous, Frivolous & Vexatious*

10. The Courts will strike out a pleading on this ground if the claim, even if known in law, is factually weak, worthless or futile.
11. The White Book Volume 1 1987 edition at para 18/19/14 states as follows:  
 Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v Prythergch (1841) 12 Sim. 363; Rubery v Grant (1872) L. R. 13 Eq. 443). "The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (per Brett L.J. in Millington v Loring (1881) 6 Q.B.D 190, p. 196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v Albion Assurance Society (1876) 45 L.J.C.P. 663).
12. If a particular pleading alleges a fact which is scandalous, the court should not strike out the pleading if the fact alleged therein is relevant and material.



13. A scandalous fact could still be relevant and material if it would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed (per Selbourne L.C. in **Christie v Christie** (1873) L.R. 8 Ch. App 499, p. 503; and see **Cahsin v Craddock** (1877) 3 Ch. D. 376; **Whitney v Moignard** (1890) 24 Q.B.D 630).
14. In **Brooking v Maudslay** (1886) 55 L.T 343, plaintiff pleaded allegations of dishonest conduct but stated in his reply that he sought no relief on that ground. The allegations thus became immaterial, and were struck out as scandalous and embarrassing.
15. Whether a particular pleading is embarrassing depends on the form of the action. Thus, averments in aggravation of damages may be, and often are, made in actions for tort, but cannot (it is submitted) be properly made in actions for breach of contract except in three cases mentioned by Lord Atkinson in **Addis v Gramophone Co. Ltd** [1909] A.C. 488, p. 495.
16. In **Bullen, Leake and Jacobs: Pleadings and Precedents** 12th edn at page 145, it is there stated that a pleading or an action is frivolous when it is without substance, is groundless, fanciful, wasting the Court's time, or not capable of reasoned argument.
17. A pleading is vexatious when it is lacking in *bona fides*, is hopeless, without foundation, and/or cannot possibly succeed or is oppressive.

#### *Abuse of Process*

18. The Courts will strike out a claim for abuse of process if its processes are not being used in good faith and for improper purposes. For example, the use of the court's process as a means of vexation or oppression or for ulterior purposes or where its process is being misused will be ground to strike out a claim for abuse of process.
19. Courts will rarely find that there is an abuse of process unless it concludes that the later proceedings amount to "unjust harassment". In the English case of **Goldsmith v Sperrings Ltd** [1977] 2 All ER 566, Lord Denning said as follows at 574<sup>1</sup>.

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<sup>1</sup> Denning LJ said:

In a civilized society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abuse when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so



20. In **Broxton v McClelland** [1995] EMLR 485 at 498 Simon Brown LJ said:

Only in the most clear and obvious case will it be appropriate upon preliminary application to strike out proceedings as an abuse of process so as to prevent a plaintiff from bringing an apparently proper cause of action to trial.

21. In **Cooper v Public Trustee Corporation Ltd** [2004] FJHC 250; HBC0082d.2000s (13 October 2004) – Pathik J said:

As to what is an abuse of process the following passage from Halsbury's Laws of England 4th Ed. Vol. 37 para 434 is apt:

"An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."

22. In **Bradford & Bingley Building Society v Seddon** [1999] 1 WLR 1482, Auld LJ in a judgment with which Nourse and Ward LJJ concurred said at p.1492:

"As Kerr LJ and Sir David Cairns emphasised in *Braggs v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep. 132, 137, 138-139 respectively, the Courts should not attempt to define or categorise fully what may amount to an abuse of process; see also per Stuart-Smith LJ in *Ashmore v British Coal Corporation* [1992] QB 338, 352. Sir Thomas Bingham MR underlined this in *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257 stating at page 263 B, that the doctrine should not be circumscribed by unnecessarily restrictive rules since its purpose was the prevention of abuse and it should not endanger the maintenance of genuine claims; see also per Saville LJ at page 266 D – E".

23. In **Manson v Vought and Others** [1999] BPIR 376, May LJ said at p.388:

"Abuse of process is a concept which defies precise definition in the abstract. In particular cases, the Court has to decide whether there is abuse sufficiently serious to prevent the offending litigant from proceeding".

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abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

## CONCLUSION

24. In my view, there is an issue between the parties as to what exactly was the agreement they had in terms of the sale of the defendant's properties by the plaintiff and the commission if any, that the plaintiff was entitled to. That much appears to be clear from the defendant. What the defendant is alleging is that the plaintiff had committed some fraud. But this is a triable issue. If the plaintiff's similar claim was dismissed for lack of prosecution in an earlier case, I see nothing wrong with him filing a fresh one, so long as he is not caught under the Limitation Act.
25. In the final, I will dismiss the application to strike out. Parties to bear their own costs. Matter adjourned to **Wednesday 18 May 2016** for mention before the Master.



A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right. Below the signature is a dotted line.

Anare Tuilevuka

**JUDGE**

11 May 2016