IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO: HBC 226 of 2013

BETWEEN : **PACIFIC VILLA DEVELOPMENT LIMITED** a duly incorporated company having its registered office at Suva.

PLAINTIFF

A N D : **SPEEDY HERO DEVELOPMENT LIMITED** trading as **THE PEARL SOUTH PACIFIC** a company incorporated in Hong Kong and having its established place of business at the Pearl South Pacific Resort, Pacific Harbour, Fiji.

DEFENDANT

BEFORE : Justice Riyaz Hamza

COUNSEL : Mr. N Lajendra for the Plaintiff
Mr. S. Nandan with Ms. N. Myers for the Defendant

RULING

INTRODUCTION AND BACKGROUND

[1] This is an application made by the Plaintiff, by way of a Writ of Summons. The Writ of Summons, together with a Statement of Claim, was filed in Court on 31 July 2013.

[2] On 7 August 2013, the Defendant filed their Statement of Defence, whereas, on 22 August 2013, the Plaintiff filed their reply to the Statement of Defence.

[3] On 13 March 2015, the Plaintiff filed Summons for Leave to File Amended Writ of Summons. The said Summons was supported by an Affidavit deposed by Will Hawney, a Director of the Plaintiff Company.

[4] Pursuant to leave being granted, on 4 December 2015, the Plaintiff filed an Amended Writ of Summons, together with an Amended Statement of Claim.

[5] On 15 December 2015, the Defendant filed their Statement of Defence to the Amended Statement of Claim. Subsequently, on 1 February 2016, an Amended Statement of Defence to the Amended Statement of Claim was filed. The Plaintiff filed their Reply to the Amended Statement of Defence, on 15 February 2016.

[6] A Pre-Trial Conference had been held between the Solicitors for the Plaintiff and the Defendant and the Minutes of the said Pre-Trial Conference have been filed in Court on 10 August 2016.

[7] The Minutes of the Pre-Trial Conference record the following:

Agreed Facts

1. That the Plaintiff was at all material times a duly incorporated company having its registered office at Suva.
2. That the Defendant is a limited liability company duly incorporated in Hong Kong but having its established place of business in Fiji at the Pearl South Pacific Resort, Pacific Harbour.
3. That the Defendant carries on the business of hotel and tourism in Fiji and operates under the name "The Pearl South Pacific".

Issues for Determination

1. Whether the Plaintiff was at all material times the registered proprietor of the land comprised on the following:
   (a) Certificate of Title No. 15674 Lot 29 on DP 3993 containing an area of 1 rood and situated in Serua, Viti Levu **("Lot 29")**;

(b) Certificate of Title No. 15675 Lot 30 on DP 3993 containing an area of 38 perches and 9/10 of perch and situated in Serua, Viti Levu **("Lot 30")**; and

(c) Certificate of Title No. 15676 Lot 31 on DP 3993 containing an area of 1 rood and 15 perches and situated in Serua, Viti Levu **("Lot 31")**.

2. Whether the Defendant has constructed an eighteen-hole golf course at the Pearl South Pacific Resort which also includes the construction of a concrete golf cart track and bridge?

3. Whether the Defendant has encroached on the land which the Plaintiff was proprietor of at all material times, by constructing a concrete golf cart track across Lots 29, 30 and 31 without obtaining prior consent of the Plaintiff?

4. Whether the Defendant has further encroached on the land which the Plaintiff was proprietor of at all material times, by constructing a bridge between Lots 29 and 30 without obtaining prior of the Plaintiff?

5. Whether the total area for the encroachment of the Defendant on Lots 29, 30 and 31 is approximately 1416 square meters?

6. Whether the construction of the concrete golf cart track and bridge has caused substantial damages to the ground surface of the land situated on Lots 29, 30 and 31?

7. Whether paragraph 11 of the Amended Statement of Claim is insufficiently particularised? Whether the Defendant's solicitors via letter dated 16 December 2015 requested for further particulars in relation to the Amended Statement of Claim? Whether the Plaintiff's Solicitors via letter dated 4 January 2016 provided the requested particulars to

Defendant's solicitors to respond to paragraph 11 of the Amended Statement of Claim?

8. Whether the Plaintiff sold Lots 29, 30 and 31 for total sum of $127,000.00 (One Hundred Twenty-Seven Thousand Dollars) instead of $210,000.00 (Two Hundred Ten Thousand Dollars)? Whether the said encroachment by the Defendant caused the Plaintiff loss of $83,000.00 (Eighty-Three Thousand Dollars) or any other amount?

9. Whether the Plaintiff is not entitled to the amended claim for any loss of damages as the Plaintiff is guilty of laches since it has failed to mitigate its loss in particular but not limited to by failing to apply to Court under Section 109 of the Property Law Act? Whether the Plaintiff has made any attempt to reclaim the area encroached upon by removing the alleged encroachment?

10. Whether the Plaintiff has bought this action against the Defendant within reasonable time? Whether the relief claimed by the Plaintiff is appropriately sought through a Writ of Summons?

11. Whether the Plaintiff is entitled to damages interests and costs as sought in the Amended Statement of Claim?

12. Whether either party is entitled to costs and on what basis?

[8] As per the Amended Statement of Claim the Plaintiff claims the following reliefs:

(i) Special damages in the sum of $83,000.00;

(ii) Interest at the rate of 5% on special damages from the date of Judgment until full payment;

(iii) General Damages;

(iv) Interest at the rate of 5% on general damages from the date of Judgment until full payment;

(v) Costs on indemnity basis; and

(vi) Such other relief as the Court may deem just and equitable in the circumstances.

[9] The hearing of this matter took place on 30 November 2016 and 23 January 2017. During the hearing the Plaintiff called 4 witnesses to prove its case:

1. Mr. Will Clifford Steven Hawney- Managing Director of the Plaintiff Company;
2. Mr. Russel Toovey- Managing Director of Axis Portfolio Pty Ltd;
3. Mr. Pumale Reddy- A Registered Surveyor; and
4. Mr. Tuate Wakaya- A Surveyor Technician with Wood & Jepsen.

[10] At the conclusion of the Plaintiff's case, the Counsel for the Defendant took up two objections:

1. An application for striking out the Plaintiff's Amended Statement of Claim; and

2. An application for non-suit.

[11] Hearing into the said two objections was taken up before me on 17 February 2017 and 12 April 2017. Both Counsel for Plaintiff and Defendant were heard. The parties also filed detailed written submissions, which I have had the benefit of perusing.

LEGAL PROVISIONS AND ANALYSIS

[12] The first objection taken up by the Defendant is for striking out in terms of the provisions of Order 18, Rule 18(1) of the High Court Rules, 1988. The Rule provides as follows:

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 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.

[13] During the hearing the Counsel for the Defendant made it clear that he will be only relying on Order 18, Rule 18(1) (a) - that the Plaintiff's Amended Statement of Claim discloses no reasonable cause of action against the Defendant.

[14] The basis on which the application is made was that 'encroachment' is not a cause of action in itself. It is a material fact which has to be pleaded to establish a cause of action. According to the Defendant, the causes of action which such a pleading can support are trespass, nuisance and negligence.

[15] The Defendant submits that from the Amended Statement of Claim, it is clear that trespass and nuisance have not been pleaded and nor are these causes of action available to the Plaintiff. At the time the amendments were made, the Plaintiff was not the registered proprietor of the land in question as the land had been sold. Therefore, the Plaintiff would not have had the standing to bring trespass and/or nuisance as a cause of action. The Defendant states that at the time the claim was amended the Plaintiff had no legal rights or interests in the Lots at all.

[16] Furthermore, the Defendant states that the Plaintiff still had a cause of action available to it in negligence. However, a perusal of the Plaintiff's Amended Statement of Claim makes it evident that the Plaintiff has not pleaded negligence against the Defendant. It is not pleaded that any of the alleged actions of the Defendant were done negligently. Negligence implies an element of carelessness on part of the

Defendant and particulars of this must be clearly pleaded in the Amended Statement of Claim.

[17] For the said reasons, the Defendant claims that the Plaintiff's Amended Statement of Claim does not plead a reasonable cause of action against the Defendant. Even if all the facts pleaded are proven, there is still no cause of action against the Defendant. It is not fair for the Defendant to not know what the cause of action against it is.

[18] In ***National MBF Finance (Fiji) Ltd v. Buli*** [2000] FJCA 28; ABU0057U.98S (6 July 2000); the Fiji Court of Appeal held:

> *"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."*

[19] In ***Tawake v Barton Ltd*** [2010] FJHC 14; HBC 231 of 2008 (28 January 2010); Master Tuilevuka (as he was then) summarised the law in this area as follows:

> *"The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (see* ***Attorney General –v- Shiu Prasad Halka 18 FLR 210 at 215****, as per Justice Gould VP; see also New Zealand Court of Appeal decision in* ***Attorney -v- Prince Gardner [1998] 1 NZLR 262 at 267.***"

[20] Master Tuilevuka also made reference to His Lordship Mr. Justice Kirby's finding in ***Len Lindon -v- The Commonwealth of Australia*** (No. 2) S. 96/005; wherein the applicable principles were summarized as follows:-

> *"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.

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 ....or is advancing a claim that is clearly frivolous or vexatious...

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.....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..... 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 pleading .....A question has arisen as to whether O 26 r 18 applies to part only of a pleading

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."

[21] This position was followed and adopted by His Lordship Justice Inoke in ***Imtiaz v Rizvi*** [2011] FJHC 108; HBC 194.2009L (3 February 2011).

[22] The contention of the Counsel for the Plaintiff is that the Defendant does not have the right to make an application for striking out at such a late stage of the proceedings. The Plaintiff also takes issue with the manner in which the application was made – that the application was made orally by the Defendant at the close of the case for the Plaintiff.

[23] In support of this contention, the Plaintiff referred to the following cases:

(a) ***Halliday v Shoesmith and Another*** (1993) 1 WLR 1 CA (29-30 June 1992);

(b) ***Shiu Ram v Carpenters Fiji Limited*** Civil Action No. HBC 081 of 2004 (1 October 2015);

(c) ***Blue Valley Plantation Berhad v Periasamy A/L Kuppannan & 21 Ors***, (Court of Appeal of Malaysia); Civil Appeal No. A-02(IM) – 972-2009.

[24] The Plaintiff contends that it has a very good case. The Plaintiff proposes to submit authorities at the end of the trial which would clearly justify that the Plaintiff has a valid cause of action.

[25] Having considered all the above case authorities, I too agree with the contention of the Plaintiff. Although, Order 18, Rule 18(1) provides that the Court may "at any stage of the proceedings" order a striking out of the pleadings, this application for striking out has been made at the close of the Plaintiff's case, which is at a very late stage in these proceedings.

[26] For this reason, the application made by the Defendant for striking out of the Plaintiff's Amended Statement of Claim is refused.

[27] Now I turn to the second objection taken up by the Defendant – the application for non-suit.

[28] The Defendant submits that a judgement for non-suit is sought when the Plaintiff has not placed sufficient evidence before the Court to succeed in its claim.

[29] The Counsel for the Plaintiff contends that there is no provision in the High Court Rules which provides for a non-suit application to be made in the High Court. He also states that the Defendant has failed to provide authorities to establish that such a practice is acceptable by the High Court in this jurisdiction.

[30] In support of the non-suit application, the Defendant referred to the case of ***Singh v. Singh*** [2013] FJHC 39; HBC 129 of 2011; 7 February 2013. In this case, it is clear that the Defendant applied for a non-suit only after informing Court that he would not call the Defendant or any other witness on this behalf. Thus the Defendant in the said case had made a submission for non-suit after closing his case.

[31] The Defendant has also referred to the case of ***Prasad v. Puniamma*** [2011] FJMC 103; Civil Action 135 of 2008 (13 September 2011). This was a non-suit application made in the Magistrate's Court, where the Learned Resident Magistrate had held that the Defendant had no case to answer and that the Plaintiff's case is non-suited.

[32] The Plaintiff places reliance on the case of ***New India Assurance Co. Ltd v. Morris Hedstrom Ltd*** [1967] 13 FLR 12; where the Fiji Supreme Court explains how a non-suit application can be made in the Magistrate's Court being a Court of summary jurisdiction. Reference was made in that case to Section 4 of the Magistrates' Court Ordinance (Cap 5), which has now been replaced by Section 46 of the Magistrates' Court Act (Cap 14). It is stated however, that the wordings as it was in the previous Ordinance and the present Act are the same. The Section reads as follows:

> *"The jurisdiction vested in magistrates shall be exercised (so far as regards practice and procedure) in the manner provided by this Act and the Criminal Procedure Code, or by such rules and orders of court as may be made pursuant to this Act and the Criminal Procedure Code, and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the county courts and courts of summary jurisdiction."*

[33] I have also considered the Judgment of the High Court in ***Chand v. Christian Mission Fellowship*** [2016] FJHC 168; Civil Action 304.2012 (17 March 2016); which was

overruled by the Fiji Court of Appeal in ***Chand v. Christian Mission Fellowship*** [2018] FJCA 16; ABU0035.2016 (8 March 2018).

[34] In ***Chand,*** the Learned High Court Judge entered judgment in favour of the Respondent. Aggrieved by the said judgment Chand filed an appeal in the Court of Appeal. The relevant grounds of appeal which came up for consideration by the Court of Appeal were, inter alia, the following:

> *".....*
> 3. *The learned trial Judge erred and/or misdirected himself in law and in fact in holding that the Non-Suit was available to a Defendant in High Court proceedings.*
> 4. *The learned trial Judge erred and/or misdirected himself in law and in fact in failing to take into account that the procedure of Non-Suit has been abrogated by the High Court Rules of Fiji, 1988.*
> 5. *The learned trial Judge erred and/or misdirected himself in law and in fact in failing to take into consideration that the High Court Rules of Fiji, 1988 provides a complete and self-code relating to the practice of withdrawal, discontinuance and striking out of an action.*
>
> *....."*

[35] In relation to the above, the Fiji Court of Appeal held as follows:

> *"[5] As the Appellant has opted to address some of the grounds of appeal together, I too will deal with them in the same sequence. As such, consideration of grounds of appeal 3, 4, and 5 and the determination thereof may render the consideration of the remaining grounds of appeal redundant, (Therefore it would be pertinent to address them at the outset).*
>
> *[6] As pointed out by the Appellant, the Respondent's counsel has made an application for non-suit which the learned Judge had upheld and entered judgment in favour of the Respondent.*
>
> *[7] Since the promulgation of High Court Rules of Fiji in 1988, we have at our disposal a complete code of procedure which nowhere recognizes the concept of non-suit. Fijian judicial precedent too is silent on the issue of non-suit.*
>
> *[8] The learned High Court Judge, at paragraph 20 of his judgment was of the following opinion:*
>
> *"First, Counsel for the Plaintiff submitted that non-suit was no longer available in the Courts of Fiji and if it were, it was only available to the Plaintiff and not the Defendant. I am afraid neither proposition holds any*

*water, Winter, J in **Faiaz Ali v Fiji Bank and Finance Sector Employees Union** [2004] FJHC 270; HBC 0088.2004 (14 December 2004); only said non suit is not a fashionable practice in Fiji, and while he also said it is an appropriate relief available to a plaintiff, he never said it was not available to a defendant".*

*[9] It is observed that the learned High Court Judge has wrongly construed the statement of Winter, J. in **Faiaz Ali** (supra) in arriving at the above conclusion. Contrary to the Learned High Court Judge's interpretation of the dictum of Winter, J, the natural inference to be drawn from the dicta is that non-suit is a relief which is available, if at all, only to a Plaintiff but certainly not to a Defendant. It thus follows that, had His lordship meant any contrary elucidation the same would have been stated in unequivocal terms.*

*[10] High Court Rules specifically deal with withdrawal and discontinuance under Order 21. Order 21 rule 2 deals with discontinuation of action without leave while Order 21 rule 3 deals with discontinuance with leave. Order 21 further deals with the effect of discontinuance under Order 21 rule 4, the stay of subsequent action until costs is paid under Order 21 rule 5, and with the withdrawal of summons under rule 26. **On a consideration of these provisions, it follows that after the High Court Rules 1988 came into force there exists no rule or order dealing with a situation of non-suit. I therefore hold that the learned trial Judge has erred by entering judgment for the Defendant as per submissions based on non-suit.***

[11] Being satisfied that the concept of non-suit has no application in Fiji, a close scrutiny of Rule 21 of High Court Rules reveals that withdrawal and discontinuance is available only to a Plaintiff (or in the case of a counterclaim to a Defendant) and therefore the Defendant has no right to move for discontinuance either, which is the relief closely resembling non-suit....."

[Emphasis is mine].

[36] Therefore, it is now settled law that there is no provision in the High Court Rules 1988 which provides for a non-suit application to be made in the High Court.

[37] For the aforesaid reasons, I refuse the application made by the Defendant for non-suit.

[38] Accordingly, I make the following Orders:

ORDERS

1. The application made by the Defendant for striking out of the Plaintiff's Amended Statement of Claim is refused.

2. The application made by the Defendant for non-suit is refused.

3. The cost of this matter shall be costs in the cause.

4. The matter to be listed for mention on Monday 12 November 2018 at 9.30 a.m.

Dated this 2nd day of November 2018, at Suva.

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI