

IN THE HIGH COURT OF FIJI
CIVIL JURISDICTION

Civil Action No. 50 of 2019

BETWEEN

LARRY CLAUNCH of 12900 Beck Road, Dallas, Oregon 97338,
United States of America as Director and Shareholder of
One Hundred Sands Limited.

PLAINTIFF

AND

ONE HUNDRED SANDS LIMITED a private limited company incorporated
under the laws of the Republic of Fiji, Level 8 BSP Life Centre,
3 Scott Street, Suva, Fiji.

FIRST DEFENDANT

AND

TIMOTHY MANNING of 19-21 Como Street, Takapuna, Auckland,
New Zealand as Director and Shareholder of
One Hundred Sands Limited.

SECOND DEFENDANT

AND

ANAND KUMAR SINGH Barrister and Solicitor at Singh & Singh Lawyers of
94 Waimanu Road, Suva.

THIRD DEFENDANT

Counsel : Mr. C. Yee with Mr. V. Filipe for the Plaintiff
Mr. A. K. Singh for the 1st Defendant
Mr. M. A. Khan for the 3rd Defendant

Date of Hearing : 29th March, 2019

Date of Ruling : 29th April, 2019

RULING

(On the application for striking out)

[1] The plaintiff filed this originating summons seeking the following orders:

1. An order for specific performance of the share sale and purchase agreement dated 3 March 2014 between the plaintiff and the second defendant.
2. An order that the plaintiff is entitled to recover the option fee and deposit less of FJD \$1.2 million.

3. An order that the 1st, 2nd and/or 3rd defendant to promptly transfer the \$1.2 million to the plaintiff
4. Costs.

[2] On 21st February, 2019 the 3rd defendant filed summons pursuant to Order 18 rule 18(1) of the High Court Rules 1088 seeking to have the Originating Summons against him struck out of the following grounds:

1. It discloses no cause of action against the 3rd defendant.
2. It is frivolous or vexatious; or
3. It is an abuse of the process of the court.

[3] Order 18 rule 18(1) of the High Court Rules 1988 provides:

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.

[4] In **Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3)** [1970] Ch 506 it was held that the power given to strike out any pleading or any Part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea.

In **Drummond-Jackson v British Medical Association** [1970] 1 W.L.R. 688; [1970] 1 All ER 1094 it was held;

Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.

In the case of **Walters v Sunday Pictorial Newspapers Limited** [1961] 2 All ER 761 it was held:

It is well established that the drastic remedy of striking out a pleading or, part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to, discloses no arguable case. Indeed, it has been conceded before us that the Rule is applicable only in plain and obvious cases.

In **Narawa v Native Land Trust Board** [2003] FJHC 302; HBC0232d.1995s (11 July 2003) the court made the following observations:

In the context of this case I find the following statement of Megarry V.C. in *Gleeson v J. Wippell & Co.* [1971] 1 W.L.R. 510 at 518 apt:

“First, there is the well-settled requirement that the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt. Second, *Zeiss No. 3* [1970] Ch. 506 established that, as had previously been assumed, the jurisdiction under the rules is discretionary; even if the matter is or may be *res judicata*, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial”.

- [5] From the decision cited above it appears that the power to strikeout a claim is a discretion conferred upon the court and the court must exercise such discretionary power with great caution and only in an exceptional case.
- [6] Having in mind the principles set above I will now consider whether there are grounds for the court to grant the application of the 3rd defendant. Affidavit of the plaintiff filed in

support of the originating summons does not disclose a cause of action against the 3rd defendant. The only averment that connects the 3rd defendant to the dispute between the plaintiff and the other defendants is the averment in paragraph 42 of the affidavit in support which reads as follows:

On 6 February 2019, I had instructed my solicitors, Haniff Tuitoga to send a Notice of Dispute of Ownership of the \$ 1.2 million to the Third Defendant, Anand Kumar Singh. The Notice said as follows:-

“we now give notice pursuant to Section 10 of the Trust Account Act from disbursing and/or making any payment of the \$1.2 million to Mr Manning or to any third party. We are commencing legal action forthwith as required by section 10 of the Trust Account Act to determine the entitlement of these funds”.

[7] Section 10 of the Trust Account Act 1996 provides:

Where before the making of a payment from a trust account a trustee has received notice in writing from any person who was a party to the business proceeding or transaction in respect of which the moneys were received that the entitlement of any person to those moneys is in dispute, the trustee shall not, save pursuant to the written consent of the parties, make payment of any such moneys until:-

- (a) the trustee is advised that legal proceedings have been commenced to determine the entitlement of any persons to the moneys whereupon the trustee shall forthwith pay the moneys into the Court in which the proceedings have been taken to abide the decision of the Court; or
- (b) when no advice is received by the trustee pursuant to paragraph (a) within a period of 60 days after the receipt of the notice first mentioned in this Section, the said period expires.

[8] From the affidavit in response, the relevant paragraph of which I have reproduced above, that the 3rd defendant has been made a party to these proceedings pursuant to section 10

of the Trust Account Act 1996. The question is whether giving notice under those provision has the effect of accruing a cause of action to sue the trustee. Section 10(a) specifies what the trustee should do when there is a dispute in respect of the money he is holding in trust that is he is required to pay the money into court.


- [9] The only relief prayed against the 3rd defendant is to transfer \$1.2 million to the plaintiff. If the plaintiff relies on the provisions of section 10(a) then the 3rd defendant cannot hold this money after he received notice and any order made pursuant to section 10 of the Trust Account Act 1996 will have no force or avail in law. Since the plaintiff has not disclosed a cause of action against the 3rd defendant the originating summons against the 3rd defendant is liable to be struck out.

ORDERS

1. The originating summons against the 3rd defendant is struck out.
2. I make no order for costs of this application.



29th April, 2019


Lyone Seneviratne

JUDGE