

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 27 OF 2018

BETWEEN : **MOHAMMED YUSUF** of Meigunyah, Nadi and **JAIMUN NISHER** of Lomolomo, Lautoka.

PLAINTIFFS

A N D : **MOHAMMED YUNUS** of Meigunyah, Nadi as the Sole Executor and Trustee of the Estate of Hassan Mohammed late of Meigunyah, Nadi, Farmer, deceased, Testate and in propria persona.

FIRST DEFENDANT

A N D : **THE DIRECTOR OF LANDS**

SECOND DEFENDANT

A N D : **THE REGISTRAR OF TITLES**

THIRD DEFENDANT

A N D : **THE ATTORNEY GENERAL OF FIJI**

FOURTH DEFENDANT

Appearances : Ms S. Ravai with Mr S. Drole for the plaintiffs
Mr R. Charan for the first defendant
Mr J. Mainavolau for the second and third defendants

Date of Hearing : 18 June 2019

Date of Written
Submissions : 12 August 2019 (2nd & 3rd defendants), 21 August 2019
(1st defendant) and 23 September 2019 (the plaintiffs)

Date of Ruling : 11 October 2019

R U L I N G

[on preliminary issue]

Introduction

- [01] This ruling concerns with a preliminary issue of time limitation.
- [02] The matter came on for trial on 18 June 2019, when the defendants raised a preliminary issue that the claim is time barred and applied to the Court that the preliminary issue should be determined before proceeding with the substantive issue. The Court accordingly invited the parties to make submissions on the preliminary issue.
- [03] At the hearing, the parties made oral submission and, in addition, sought time to file their respective written submissions. The Court then set timeframe within which the parties must file their written submissions. In compliance with the timeframe, the parties have filed their written submissions.

Background

- [04] The brief background facts are as follows.
- [05] The plaintiffs, Mohammed Yusuf and Jaimun Nisher and the first defendant, Mohammed Yunus are siblings.
- [06] The first defendant is sued in his capacity as the sole Executor and Trustee of the Estate of Hassan Mohammed late of Meigunyah, Nadi (*'the deceased'*) and in his own person.
- [07] The deceased was their father.
- [08] The deceased was seized of a State Lease by way of an approval Notice under Lands Department Reference No. LD 4/10/1339 for a land in Meigunyah Sector (*'the 1st lease'* or *'the property'*).
- [09] The deceased died on 16 April 1988. The first defendant obtained the probate under the Will of the deceased (*'the 1st Will'*).

- [10] The first Will bequeathed the first lease in equal half shares to the first defendant and to the deceased wife (*the wife*).
- [11] The wife died and the first named plaintiff obtained the probate under the wife's Will (*the 2nd Will*), which bequeathed her share in the estate of the deceased (50% over the 1st lease) to both the plaintiffs in equal shares.
- [12] In or about March 1992, the plaintiffs allege, the first and second defendants wrongfully and in collusion without the consent of the wife facilitated the issuance of a registered lease over the first lease for the balance remaining terms (of 5 years 7 months and 10 days) (*the 2nd lease*) in the defendant's name as the absolute owner. Further, according to the plaintiffs, first and second defendants repeated their wrongful conduct by extending the second lease for a period of 20 years upon expiry of the balance term.
- [13] The plaintiff also alleges that upon expiry of the second lease, the first and second defendants again wrongfully and in collusion facilitated the issuance of a Crown Lease No. 21312 in the name of the first defendant for a period of 99 years in November 2017 (*the 3rd lease*) while the first named plaintiff continues with her occupation over the first, second and third lease.
- [14] In the light of the above facts, the plaintiffs seek among other things a declaration that the first defendant holds Crown lease No. 21312 in trust as to the 50% for the benefit of the plaintiffs and an order that the third defendant (the Registrar of Title) do amend accordingly the Registration over State Lease No. 21312 to reflect the interest of the plaintiffs.
- [15] When the matter came up for trial, the defendants took a preliminary issue of limitation and sought dismissal of the action.

The preliminary issue

- [16] The preliminary issue raised by the defendants was that the plaintiffs' action is time barred and exceeds the limitation period prescribed under ss. 4 and 10 of the Limitation Act 1971 (*the Act*).

The Law

[17] The High Court Rules 1988, as amended ('HCR'), O 18, R 18 states so far as relevant:

"Striking out pleadings and indorsements (O 18, R 18)

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)...;*
- (b)...;*
- (c)...; 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".

[18] Section 4(1) (a) of the Act says:

"Limitation of actions of contract and tort, and certain other actions

The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say-

- (a) Actions founded on simple contract or tort."*

[19] Section 10 of the Act provides:

"Limitation of actions claiming personal estate of a deceased person

10 Subject to the provisions of section 9 (1), no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of 12 years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of 6 years from the date on which the interest became due."

The submissions

The first defendant

- [20] Mr Charan, counsel for the first defendant submits the plaintiffs bring this action against the first defendant in his (first defendant) capacity as the sole Executor and Trustee of the testators estate. The plaintiffs are claiming a benefit under the estate Testator who dies on 16 April 1988, some 31 years ago. Given the date of the Testator any benefit which may have accrued in favour of the plaintiffs accrued 31 years ago. Under s. 10 of the Act, the plaintiffs cannot bring this action after the lapse of 30 years to claim a benefit under Testator's estate as the action is time barred.

Second and third defendants

- [21] Mr Mainavolau of counsel for the second and third defendants submits: the plaintiff is claiming negligence against the defendants. Negligence is a tort. It is clear that the plaintiff has pleaded negligence transfer of State Lease No. 11524 to the first defendant. The issuance of State Lease No. 21312 emanates from State Lease No. 11524. He specifically submits that the cause of action first arose in March 1992 and not in November 2014 like the plaintiffs argues. The creation of State Lease No. 21312 originated from the transfer that took place in March 1992 for which negligence has been claimed against the Director of Lands. The plaintiff's claim falls outside the statutory time limit set under s. 4 (1) (a) of the Limitation Act.

Plaintiffs

- [22] Counsel appearing for the plaintiffs, Ms Ravai on the other hand submits that: section 10 (1) of Limitation Act has no application to the plaintiff's case. There is no Estate of Hassan Mohammed at present. In fact, the plaintiffs have no interest in the estate of Mohammed Hassan. There were only two beneficiaries in that estate namely the first defendant and one Hayat Bano. Hayat Bano bequeaths her 50% share in the Hassan estate to the plaintiffs in equal shares. She died in the

year 2014. Thus the limitation period does not affect the plaintiffs. It is alleged that the first defendant as Trustee of the estate of Mohamed Hassan did a wrongful act. S. 9 (1) of the Limitation Act clearly allows the plaintiffs to proceed with the present claim.

Discussion

- [23] The plaintiffs' claim arises out of the first lease which was issued to the deceased father. The deceased father died in April 1988, and he left behind a Will bequeathing the property on the first lease to his wife and to the first defendant in equal shares. The first defendant obtained the probate under the deceased father's Will.
- [24] The main allegation in the statement of claim is that sometime in March 1992, the first and second defendants wrongfully and in collusion without the consent of the wife facilitated the issuance of a registered lease over the first lease for the balance remaining terms (*'the 2nd lease'*) in the first defendant's name as the absolute owner.
- [25] It will be noted that in March 1992, the first defendant became the absolute owner of the entire property on the first lease, i.e. when the wife of the deceased was still alive. This translates that the wife did not have disposable right over the property.
- [26] The plaintiffs claim 50% interest in the property on the basis of the wife's Will, which bequeaths her 50% share in the property to the plaintiffs in equal shares.
- [27] The first defendant is not a trustee under the wife's Will. The first named plaintiff has obtained the probate under the wife's Will.
- [28] The plaintiffs in their statement of claim do not say that they were unaware of the issuance of the second lease to the first defendant in 1992, whereby he became the absolute owner of the entire property. It is in their reply to the statement of defence they say that they were unaware of the issuance of the second lease to the first defendant.

- [29] The cause of action, if any, arose when the first lease was transferred to the first defendant in 1992. Such cause of action was available to the wife because she was a beneficiary under the deceased father's Will, not the plaintiffs.
- [30] The wife died in April 2014. She did not take any action to challenge the transfer of the first lease to the first defendant absolutely, which occurred in 1992.
- [31] Section 10 of the Limitation Act says that no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of 12 years from the date when the right to receive the share or interest accrued.
- [32] The right to receive the share or interest accrued to the wife under her husband's Will (the deceased's Will) when her husband died in 1988. The wife did not do anything to assert her right to receive the share which accrued to her in 1988.
- [33] The plaintiffs submit that section 9 (1) of the Limitation Act clearly allows the plaintiffs to proceed with the present claim.
- [34] Section 9 (1) of the Act states:

"Limitation of actions in respect of trust property

9 (1) No period of limitation prescribed by the provisions of this Act shall apply to an action by a beneficiary under a trust, being an action-

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee, trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his or her use."

- [35] The first defendant is not a trustee under the wife's Will under which the plaintiffs claim interest in the property. Therefore, section 9 has no application to the present case.

Conclusion

[36] For the reasons I have set out above, I would uphold the preliminary issue raised by the defendants that cause of action, if any, arose in 1992 (that also to the wife of the deceased, not to the plaintiffs) and the plaintiffs have brought this action claiming interest in an estate after the lapse of 30 years against section 10 of the Limitation Act, which prohibits an action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate to be brought after the expiration of 12 years from the date when the right to receive the share or interest accrued. Obviously, the plaintiffs' claim is time barred. I would accordingly dismiss the plaintiffs' claim. I order the plaintiffs to pay summarily assessed costs of \$300.00 to the first defendant and \$300.00 to the second and third defendants, totalling \$600.00.

The result

1. Preliminary objection upheld.
2. Plaintiffs' claim statute barred.
3. Plaintiffs' claim dismissed.
4. Plaintiff shall pay summarily assessed costs of 300.00 to the first defendant and \$300.00 to the second and third defendants totalling \$600.00.

M.H. Mohamed Ajmeer
11/10/19

M.H. Mohamed Ajmeer
JUDGE



At Lautoka
11 October 2019

Solicitors:

For the plaintiffs: Fazilat Shah Legal, Barristers & Solicitors

For the first defendant: Ravneet Charan Lawyers, Barristers & Solicitors

For the second and third defendants: Office of the Attorney General