IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 322 of 2022

BETWEEN : **ARVIND KUMAR** of Tokotoko Back Road, Navua, Fiji, Mechanic.

PLAINTIFF

AND : **MARY JOAN NELSON** of 49 Carnavon Street, Suva, Retired.

DEFENDANT

AND : **THE REGISTRAR OF TITLES** having its registered office at Level 1, Suvavou House, Victoria Parade, Suva, Fiji.

NOMINAL PARTY

Counsel: **Plaintiff: Mr Chand. A**
Defendant: Mr Nuibalavu. P

Date of Hearing: 31.01.2023
Date of Judgment: 15.02.2023

JUDGMENT

INTRODUCTION

1. Plaintiff instituted this action in 2022, for specific performance of a sale and purchase agreement entered on 1.4.2009 regarding freehold land comprised in Certificate of Title No 23929 (the Land). Plaintiff in the statement of claim pleaded that two weeks, after entering of the sale and purchase agreement Defendant had informed that she would not sell the Land. Plaintiff had lodged a caveat, but this was subsequently removed. According to Plaintiff, he had requested for return of the deposit paid, but this was not done, but he was granted possession. Earlier, Plaintiff had instituted an action for specific performance but this action was struck off for want of prosecution. Plaintiff is seeking specific performance in this action and also injunctive relief restraining first Defendant from transferring, mortgaging, charging or dealing with the property comprised in CT 23929 (The Land) and restraining interfering with Plaintiff's farming

on the Land. This is an application by way of summons injunctive relief, and facts stated in the affidavits as to the sale and purchase agreement and payment of the deposit of $20,000 was admitted. Time was the essence of the sale and purchase agreement, and ninety days given to complete payment of remaining $100,000 and for settlement. Plaintiff had not presented this amount to Defendant within stipulated 90 day time period and or sought specific performance of the sale and purchase agreement, which was a specific remedy under said agreement for default of vendor. According to Plaintiff's affidavit, Defendant had refused to transfer the Land to Plaintiff two weeks after they signed sale and purchase agreement and Plaintiff had requested return of deposit money $20,000, instead of payment of $100, 00 on time and seeking transfer of the Land. So, it is inequitable to injunctive relief in an action seeking specific performance after thirteen years when time is the essence of the contract and execution of settlement was only ninety days. It is also inequitable to allow an injunction when Plaintiff had previously instituted an action for specific performance and let it struck off by court due to failure to prosecute it. When time is the essence of an agreement it will be inequitable to not to apply limitation 'by analogy' in terms of section 4(7) of Limitation Act 197. Laches on the part of Plaintiff had made it inequitable too.

FACTS

2. There is no dispute as to the entering of sale and purchase agreement regarding the Land. According to the affidavit in support,

    a. Plaintiff had entered sale and purchase agreement with firs Defendant on 1.4.2009 of the Land.
    b. Plaintiff paid a sum of $20,000 to the first Defendant as a deposit, upon entering to the sale and purchase agreement.
    c. Two weeks after Defendant informed her unwillingness to sell the Land.
    d. Plaintiff had requested for refund of the said sum, but without avail.
    e. Plaintiff through his solicitors had lodged a caveat on the Land but this was subsequently removed.
    f. Plaintiff was granted permission to cultivate the Land and had done so, since 2009.
    g. Plaintiff did not pay Defendant for above mentioned cultivation.
    h. Plaintiff had instated an action for specific performance based on the sale and purchase agreement of 1.4.2009.
    i. The above mentioned action was struck off for want of prosecution in terms of Order 25 rule 9 of High Court Rules 1988.

3. Defendant in the affidavit in opposition had admitted the entering of sale and purchase agreement on 1.4.2009 and acceptance of deposit of $20,000.

4. Defendant stated in the affidavit in opposition she had instructed the solicitors to cancel the sale and purchase agreement, and offered $20,000 but this was refused by Plaintiff.

5. According to Defendant sale and purchase agreement was breached by Plaintiff due to his inability to settle the balance by 1.7.2009, in terms of the said agreement.

6. Defendant also stated that Plaintiff had repeatedly failed to settle or proceed with previous action seeking specific performance.

ANALYSIS

7. Plaintiff in this action again seeks to specifically perform, sale and purchase agreement executed on 1.4.2009.

8. The Sale price of the Land in terms of said sale and purchase agreement was $120,000 and Plaintiff had paid $20,000. So he seeks to transfer the Land, upon payment of balance through an action for specific performance.

9. Plaintiff in the summons seeking injunctive relief is seeking following orders,

   a. "Restraining the Defendant whether by herself and or her servants and or agents and or employees or otherwise howsoever from transferring, mortgaging, charging or dealing with the property comprised in Certificate of Title No 23929 known as "Debua Block 2" Lot 1 on deposited plan no . 5959
   b. That Defendant by herself and or hers servants and or agents and or employees or otherwise howsoever be restrained from interfering with the Plaintiff's farming and occupancy of Certificate of Title No 23929 known as ……."

10. In order to maintain the *status quo* till hearing and determination of the summons an interim injunction was granted not to interfere with Plaintiff's farming on the Land.

11. Statement of claim and also injunctive relief are based on sale and purchase agreement dated 1.4.2009. Plaintiff seeks to enforce the said sale and purchase agreement, in this action which was instituted on 9.11.2022.

Limitation

12. Plaintiff had instituted an action seeking specific performance of the sale and purchase agreement entered on 1.4.2009, within six years previously, but it was struck off for want of prosecution by Plaintiff.

13. Plaintiff had again instituted present action seeking specific performance in terms of the sale and purchase agreement.

14. According to Plaintiff's own admission cause of action for specific performance had accrued to Plaintiff two weeks from execution of sale and purchase agreement of 1.4.2009 as the Defendant had informed her intention not to sell the Land in terms of

sale and purchase agreement of 1.4.2009. Said agreement specifically stated, time as the essence of the said agreement and ninety day period from its execution.

15. If so Plaintiff's rights are protected under common law in terms of the sale and purchase agreement. These were the terms both parties had negotiated and or voluntarily entered. Hence both parties are bound by the terms of said sale and purchase agreement.

16. Party autonomy in civil transactions is paramount consideration and when the parties had stated 'Time will be the essence', of the contract, it should be honoured. If one party did not honour the provisions it should be taken action without delay.

17. According to sale and purchase agreement of 1.4.2009, *inter alia* stated,

   a. Purchase price of the Land was $120,000
   b. Refundable deposit of $20,000 to be paid upon execution of it.
   c. Balance $100,000 to be paid within 90 days from execution of it.
   d. Time shall be the essence.
   e. Date of settlement (transfer of the Land) be 90 days from the date of execution of the agreement or any other date mutually agreed.
   f. If the vendor makes a default for more than 14 days ,
      i. Rescind the contract, and money paid refundable.
      ii. Sue for specific performance.
      iii. Sue for special and general damages.

18. So, the rights of the parties were mutually agreed between the parties in terms sale and purchase agreement and one such remedy was an action for specific performance in terms of the said agreement.

19. In the statement of claim Plaintiff had sought specific performance of sale and purchase agreement entered on 1.4.2009 upon the payment of balance sum of $100,000.

20. The payment of balance sum of $100,000 needed to be within ninety days from 1.4.2009 and parties had agreed in the said contract that, time was the essence of the said agreement.

21. When time is the essence of the contract, court had refused specific performance outside time period. See (*Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514, [1997] 2 All ER 215). This is to accept nature of the transaction agreed by parties and exclude claim on equity. When parties had expressly defined their rights under the contract and had also stated that paramount consideration is the time, it will be inequitable to seek enforcement of the same agreement, by way of equitable relief thirteen years later and also seek an equitable remedy of injunction.

22. Plaintiff and Defendant in this action had entered in to sale and purchase agreement on 1.4.2009. They had laid down respective rights and obligations including the action for specific performance in case of a breach of an agreement by either party.

23. So, if the Defendant did not transfer the property upon presentation of $100,000, Plaintiff must seek the agreed relief for the default of the vendor. There is no evidence of either presentation of $100,000 within ninety days, and it will be unconscionable to seek specific performance of a sale of a land thirteen years, when the time is considered as essence of the said sale and purchase agreement.

24. So both parties are bound by the terms of the said sale and purchase agreement where time is considered as paramount importance.

25. Plaintiff in the written submission, contended that since this action is for a claim based on specific performance, there is no period of limitation as the claim is an equitable relief in terms of Section 4(7) of Limitation Act 1971.

26. Section 4 of Limitation Act 1971 is reproduced in full below,

"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:

Provided that-

(i) in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and

(ii) nothing in this subsection shall be taken to refer to any action to which section 6 applies.

(2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

(3) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued:

Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

(4) An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

(5) An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any Act or imperial enactment shall not be brought after the expiration of two years from the date on which the cause of action accrued:

Provided that for the purposes of this subsection the expression "penalty" shall not include a fine to which any person is liable on conviction of a criminal offence.

(6) Subsection (1) shall apply to an action to recover seamen's wages, but save as aforesaid this section shall not apply to any cause of action within the Admiralty jurisdiction of the Supreme Court which is enforceable in rem.

(7) This section **shall not apply to any claim** for specific performance of a contract or for any injunction or for **other equitable relief, except in so far as any provision thereof may be applied by the court by analogy** in like manner as has, prior to the commencement of this Act, been applied." (emphasis added)

27. Section 4(7) of Limitation Act 1971, had not excluded all claims for specific performance of a contract from limitation time stipulated in terms of Section 4(1) of the same Act.

28. It is only a claim on equitable relief, other than claims that can be applied by the courts 'by analogy' are excluded.

29. Both parties as well as the decisions referred in the written submissions had not considered the exclusions court can apply by analogy in terms of Section 4(7) of Limitation Act 1971. The only case that Plaintiff had referred to in the written submission, had not dealt with the exception of 'application by analogy'. If the intention of the legislation was to exclude all claims of equity there was no need to use 'except in so far as any provision thereof may be applied by court by analogy'.

30. I was not submitted any local of, case that had dealt with the issue of application by analogy in terms of Section 4(7) of Limitation Act 1971.

31. Plaintiff had sought specific performance in terms of sale and purchase agreement entered on 1.4.2009, to pay the balance $100,000 for the transfer of the Land.

32. According to Plaintiff Defendant had refused to sell the Land. Sale and purchase agreement contained a relief for specific performance when a party defaulted. So 'by analogy' there was a cause of action for specific performance in terms of sale and purchase agreement, for breach of agreement as time was the essence of the contract.

33. Plaintiff's claim for specific performance is a relief available under the sale and purchase agreement where parties had voluntarily agreed to that "time is the essence". So by analogy Plaintiff's claim

> *P&O Nedloyd BV v Arab Metals Co and others* [[2005] All ER (D) 237 (Jun)[2005] EWHC 1276 (Comm)
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> In Spry on Equitable Remedies, 5th Edn, it is stated at p419:
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> "...it must be seen first whether there is a special statutory provision that affects directly, whether expressly or by implication, the particular equitable right in question. But if there is no such provision, the court may decide that the material equitable right is so similar to legal rights to which a limitation provision is applicable that that limitation period should be applied to it also. In this latter case the limitation period is said to be applied by analogy, and the principles that govern cases of this kind are that if there is a similarity between the exclusive equitable right in question and legal rights to which the statutory provision applies a court of equity will ordinarily act upon it by analogy but that it will so act only if there is nothing in the particular circumstances of the case that renders it unjust to do so. What is regarded by the courts of equity as a sufficiently close similarity for this purpose involves a question of degree, and reference must be made to the relevant authorities. The basis of these principles is that, in the absence of special circumstances rendering this position unjust, the relevant equitable rules should accord with comparable legal rules."

34. In my mind it would be, unjust to grant specific performance when Plaintiff had instituted an action for specific performance and failed to prosecute the same and that had resulted matter being struck off.

35. By the same token it will be unjust to seek specific performance thirteen years after execution of a sale and purchase agreement which parties expressly stated that 'Time shall be the essence.'

36. According to Plaintiff's affidavit when he was informed within two weeks of entering the sale and purchase agreement that Defendant was not going to sell the Land, he wanted only the deposit. This was an option available, instead of insisting on transfer upon presentation of balance within stipulated ninety day time period.

37. According to Plaintiff as specific performance can be sought by court at any time even after an action is stuck off for their own fault.

38. If the contention of Plaintiff is accepted even if this action is truck off for Plaintiff's failure to prosecute he can bring a fresh action again, relying on Section 4(7) of Limitation Act 1971, for an action on specific performance! This will be an abuse of process but also an absurd situation, and unconscionable.

39. Apart from that it is unjust to allow specific performance of a contract where time was the essence of the contract, to be enforced even after statutory limitation time period of six years, without application of the exception of said rule by analogy.

40. Even if I am wrong on the above, Plaintiff's claim for specific performance, in terms of sale and purchase agreement is a claim for breach of contract by Defendant. So when the Plaintiff had instituted pervious action seeking specific performance within six year time period, he had the opportunity to prosecute with due diligence, but when he had failed to do so it is unjust to allow the injunctive reliefs he had sought regarding the Land.

41. In *P&O Nedlloyd BV v Arab Metals Co and others*. [2007] 2 All ER (Comm) 401 UK court of Appeal (Civil) decision dealt the issue of 'Limitation by Analogy' and held,

> '[38] These passages support the conclusion that if a statutory limitation provision, properly interpreted, applies to the claim under consideration, equity will apply it in obedience to the statute, as indeed it must. **However, even if the limitation period does not apply because the claim is for an exclusively equitable remedy, the court will nonetheless apply it by analogy if the remedy in equity is 'correspondent to the remedy at Law'**. In other words, where the suit in equity corresponds with an action at law a court of equity adopts the statutory rule as its own rule of procedure.' (emphasis added)

42. So what needs to considered here is whether specific performance sought by Plaintiff 'corresponds with an action at law' considering the circumstances of the case, as available at this moment.

43. Section 4(7) of Limitation Act 1971, allows limitation to be applied in analogy as in the statute, despite it being an equitable remedy.

44. This can be done on admitted facts as there are no dispute as to the sale and purchase agreement and payment of the deposit in terms of said agreement and also sale price of the land under said agreement and Plaintiff seeking return of deposit instead of insisting on the transfer when he was informed of the Defendant's reluctance to transfer the Land.

45. Plaintiff's claim in the statement of claim, for transfer of the Land upon payment of $100,000 is based on the sale and purchase agreement of 1.4.2022.What needs to be

considered is by analogy the claim contained in the statement of claim 'corresponds with the remedy' under contract which considers the time as essence.

46. Claim for specific performance was expressly recognized as a remedy in the sale and purchase agreement by both parties under the contract where they recognized the time periods for settlement of the transfer. This was ninety days from 1.4.2009, this is justified as the land price will not remain same over a long period of time. So there is clearly a claim for specific performance in terms of the sale and purchase agreement, where parties had also stated time as the essence of the said agreement. So in my mind the claim of the Plaintiff for specific performance is by analogy identical to contractual relief.

47. This position of 'application by analogy' the limitation period for equitable relief, is further explained in the said UK Court of Appeal judgment in _P&O Nedlloyd_ (Supra) Per Moore-Bick LJ stated further,

> [39] In _Cia de Seguros Imperio (a body corporate) v Heath_ *(REBX) Ltd (formerly CE Heath & Co (North America) Ltd)* [2000] 2 All ER (Comm) 787, [2001] 1 WLR 112the claimant began proceedings in September 1995 seeking to recover damages from the defendant for breach of various agreements made between May 1977 and April 1979 and for damages for negligence and **breach of fiduciary duty**, as well as other relief. Upholding the decision of the judge on a trial of preliminary issues this court held that although the claim for equitable damages or equitable compensation was a claim for equitable relief to which s 36(1) of the 1980 Act applied, ss 2 and 5 of the 1980 **Act should be applied by analogy to the claim for breach of fiduciary duty and that the claim was therefore time-barred.** Having referred to the speech of Lord Westbury in _Knox v Gye_ and to Spry The Principles of Equitable Remedies (5th edn, 1997) pp 419–420 Waller LJ said ([2000] 2 All ER (Comm) 787, [2001] 1 WLR 112
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> "In my view the authorities cited by Mr Gross and the broad principles set out in the above quotations support the submission that equity would have taken the view that it should apply the statute by analogy to a claim for damages or compensation for a dishonest breach of fiduciary duty. I say that because what is alleged against Heaths as giving rise to the dishonest breach of fiduciary duty are precisely those facts which are also relied on for alleging breach of contract or breach of duty in tort. It is true that there is an extra allegation of 'intention' but that does not detract from the fact that the **essential factual allegations are the same**. Furthermore, the claim is one for 'damages'. The prayer for relief has now been amended with our leave to add a claim for 'equitable compensation', but the reality of the claim is that it is one for damages, the assessment of which would be no different whether the claim was maintained as a breach of contract claim or continued simply as a dishonest breach of fiduciary duty claim."

[40] Later, at p 124, he approved and adopted as applicable to the case before him the following passage from the judgment of Mr Jules Sher QC in *Coulthard v Disco Mix Club Ltd* [1999] 2 All ER 457, [2000] 1 WLR 707, 730, [1999] FSR 900:

"Mr Bate argues that the court of equity will apply the statute by analogy only where the equitable remedy is being sought in support of a legal right or the court of equity is being asked to decide a purely legal right, and he cites passages from *Hicks v Sallit* (1854) 3 De G M & G 782, 43 ER 307 and *Hovenden v Lord Annesley* (1806) 2 Sch & Lef 607. I have no doubt that the principles of application by analogy to the statute (or, in obedience to the statute, as Lord Redesdale LC preferred to describe it in its application to the facts of Hovenden's case), are quite apposite in the situations envisaged by Mr Bate. But, in my judgment, they have a much wider scope than that: one could scarcely imagine a more correspondent set of remedies as damages for fraudulent breach of contract and equitable compensation for breach of fiduciary duty in relation to the same factual situation, namely, the deliberate withholding of money due by a manager to his artist. It would have been a blot on our jurisprudence if those selfsame facts gave rise to a time bar in the common law courts but none in the court of equity."

[41] Clarke LJ, agreeing with Waller LJ, said at p 125:

"I would certainly have expected a court of equity to apply the common law time limits by analogy on the facts of this case. As Waller LJ has pointed out, and as the judge demonstrated by a detailed analysis of the points of claim, the essential nature of the pleaded case is the same whether it is put as damages for breach of contract, damages for breach of duty or damages (or compensation) for breach of fiduciary duty. The only additional element is the Defendant's alleged intention, which on the facts here adds nothing of substance to the claim for damages. Indeed it would be quite unnecessary to include this claim if it were not thought necessary to do so in order to advance the time bar argument."

[42] Later, at p 126, he said:

"To adopt the words of Spry, there is a sufficiently close similarity between the exclusive equitable right in question, namely the claim for compensation for breach of fiduciary duty, and the legal rights to which the statute applies, namely the claim for damages for breach of contract founded on simple contract and the claim in tort for damages for breach of duty, that a court of equity would (and will) ordinarily act on the statute of limitation by analogy. There is nothing in the particular circumstances of the case to make it unjust to do so. On the contrary, it is just to do so because there is no reason why, if the claims for damages for breach of contract and tort are time barred, the claim for damages for breach of fiduciary duty should not be time barred also. As Spry put it, the relevant equitable rules should accord with the comparable legal rules."

48. There are reasons given in the above judgment for application of limitation in analogy to equitable claims, though in that case on the facts of that case specific performance was held common law court 'would not grant coercive remedy such as specific performance'. In contrast to facts of that case, the sale and purchase agreement of 1.4.2009 specifically granted Plaintiff an option either to seek return of deposit or seek specific performance upon payment of remaining $100,000 within ninety days. Plaintiff had only sought return of money.

49. In contrast to said case in terms of the sale and purchase agreement specifically included a provision for specific performance in default of obligation of vendor and the time is the essence of the entire contract. So it is inequitable to seek injustice relief after thirteen years.

Laches

50. Even if I am wrong on the above, equity will not be a remedy when there is laches.

51. In _Nawakobi v Nzekwu_ [1964| 1 WLR 1019 UK Privy Council decision held that in order to seek a defence of laches must show on balance the right of Plaintiff was outweighed to equity of Defendant. Plaintiff is the registered proprietor of the Land. According to the affidavit in support Defendant, had not paid deposit of $20,000 but had granted possession of the Land and farm on it without a rental for thirteen years.

52. In this instance, Plaintiff had not presented agreed settlement sum in 2009 when the time was the essence of the sale and purchase agreement.

53. Plaintiff had sought return of $20,000 and instead of that had got possession of the land where he did farming for thirteen years and had earned without any payment of Defendant.

54. Apart from that land value increase over thirteen year time period and it will be inequitable to seek transfer of the Land to a price agreed in 2009 when the time was the essence of the said contract where ninety day time period was specified for completion.

55. Plaintiff had not promptly sought to enforce the sale and purchase agreement of 1.4.2009 when alleged breach of Defendant.

56. If Plaintiff preferred specific performance instead of return of deposit, he could have presented the money within ninety day period from 1.4.2009 and insist on Defendant to transfer the Land. Plaintiff had not done so but exercised the option of return of deposit and had requested that from Defendant. Both parties knew time was the essence of the sale and purchase agreement and settlement was within ninety days.

57. Plaintiff had placed a caveat on the property and this had also expired, but Plaintiff did not take any action for extension of it.

58. Plaintiff had previously filed an action, but failed to prosecute the same and was stuck off.

59. Plaintiff had enjoyed the property for over thirteen years and it is inequitable to grant an injection against Defendant, the title holder.

60. According to Defendant Plaintiff had not paid $100,000 within ninety day time period. If so deposit could be forfeited as liquidated damages in terms of clause 11 (c) of sale and purchase agreement of 1.4.2009.

61. So, it is inequitable to grant in injection to restrain Defendant's rights due to the actions of the Plaintiff who had allowed the caveat to be removed and also previous action to be struck off and also enjoyment of property without payment of rental for.

Res Judicata

62. Plaintiff had instituted a civil action in the High Court of Lautoka, based on the same or similar facts regarding the sale and purchase agreement entered on 1.4.2009.

63. In the said action Plaintiff sought specific performance, but the action was struck off due to want of prosecution on 12.3.2020.

64. Plaintiff through his solicitors had filed an application for reinstatement of the struck off action but on 28.9.2020 this application was dismissed.

65. Plaintiff in the written submission contend that their previous action seeking specific performance on the same facts , did not end with a final judgment of the issues , hence the principles of res judicata is not a bar for this action.

66. In *P&O Nedlloyd BV v Arab Metals Co and others* [2006] EWCA Civ 1717 UK Court of Appeal decision discussed the issue estoppel

> "[21] Issue estoppel is a form of estoppel by record which ultimately rests on a principle of public policy that there should be finality in litigation. Its recognition and development in the modern law is often credited to the following passage in the judgment of Diplock LJ in *Thoday v Thoday* [1964] P 181, 197-198, [1964] 1 All ER 341, [1964] 2 WLR 371:
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> "The particular type of estoppel relied upon by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call **'cause of action estoppel'**, is that which

prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the **non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties**. If the cause of action was determined to exist, ie, judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful Plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim 'Nemo debet bis vexari pro una et eadem causa'. In this application of the maxim 'causa' bears its literal Latin meaning. The second species, which I will call **'issue estoppel'**, is an <u>extension of the same rule of public policy</u>. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the Plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.

But **'issue estoppel' must not be confused with 'fact estoppel'**, which, although a species of 'estoppel in pais', is **not a species of estoppel per rem judicatam**. The determination by a court of competent jurisdiction of the existence or nonexistence of a fact, the existence of which is not of itself a condition the fulfilment of which is necessary to the cause of action which is being litigated before that court, but which is only relevant to proving the fulfilment of such a condition, does not estop at any rate per rem judicatam either party in subsequent litigation from asserting the existence or non-existence of the same fact contrary to the determination of the first court." (Emphasis added.)

[22] Diplock LJ returned to the question of issue estoppel in <u>*Fidelitas Shipping Co Ltd v V/O Exportchleb*</u> [1966] 1 QB 630, 641 where he said:

"The final resolution of a dispute between parties as to their respective legal rights or duties may involve the determination of a number of different 'issues,' that is to say, a number of decisions as to the legal consequences of particular facts, each of which decisions constitutes a necessary step in determining what

are the legal rights and duties of the parties resulting from the totality of the facts. To determine an 'issue' in this sense, which is that in which I shall use the word 'issue' throughout this judgment, it is necessary for the person adjudicating upon the issue first to find out what are the facts, and there may be a dispute between the parties as to this. But while an issue may thus involve a dispute about facts, a mere dispute about facts divorced from their legal consequences is not an 'issue'." (Emphasis added.)

[23] In In re State of Norway's Application [1990] 1 AC 723, [1989] 1 All ER 745, [1989] 2 WLR 458it became necessary for this court to consider again the ambit of the principles relating to issue estoppel. Having referred to the judgment of Diplock LJ in *Thoday v Thoday* and other authorities, and having cited extensively from Spencer Bower and Turner, The Doctrine of Res Judicata, 2nd edition, the court (May, Balcombe and Woolf LJJ) held that the **only decisions capable of giving rise to an issue estoppel are those which are necessary to the court's substantive decision.** At p 752 Balcombe LJ cited with approval the following passage from Spencer Bower and Turner:

"In order to make this essential distinction [between the fundamental and the collateral] one has always to inquire with unrelenting severity – is the determination upon which it is sought to found an estoppel so fundamental to the substantive decision that the latter cannot stand without the former. Nothing less than this will do."

[24] In the third edition of this work, edited by K J R Handley of the Court of Appeal of New South Wales and entitled Spencer Bower, Turner and Handley, The Doctrine of Res Judicata, the position is described as follows:

"HOW TO DISTINGUISH THE FUNDAMENTAL FROM THE COLLATERAL

202 . . . In order to make this distinction one has to enquire whether the determination was so fundamental to the decision that the latter cannot stand without it."(emphasis added)

67. As the previous action for specific performance was not finally determined there is no cause of action estoppel. In the previous action there was an application for summary judgment which was refused. As the previous decision refusing summary judgment, was not substantive decision there is no issue estoppel hence the principle of res judicata is not a bar for this action.

68. Plaintiff should also be aware that he cannot institute actions in court and abandon them and allow the High Court at Lautoka to strike out the initial action due to Plaintiff's

failure to prosecute the action and institute the same action again at Suva and also seek equitable remedy of injunction, which is discretionary.

69. Without prejudice to the issues of limitation by analogy and res judicata the principles of granting injunction is discussed in brief. .*American Cyanamid Co v Ethicon* [1975] AC 396, [1975] 1 All ER 504, HL, per Lord Diplock

> Held,
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> "Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as 'a probability', 'a prima facie case', or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt **must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried**.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. **One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing'** (Wakefield v Duke of Buccleuch ((1865) 12 LT 628)). So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

70. There is no undertaking as to the damages, in the affidavit in support of injunction of Plaintiff.

71. Plaintiff had failed to satisfy from the evidence presented in the affidavit, that he has a serious question to be tried considering the laches where time was the essence of the sale and purchase agreement.

72. *American Cyanamid Co v Ethicon* [1975] AC 396, [1975] 1 All ER 504, HL further held,

> "As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the

trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. **If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction."**(emphasis added)

73. Plaintiff is seeking specific performance of a sale and purchase agreement entered on 1.4.2009 after thirteen years, when the settlement was specifically ninety days and time was the essence of the said contract. Plaintiff having failed to pay $100,000 to vendor within ninety days, had taken thirteen years to seek specific performance. The laches and conduct of Plaintiff does favour balance of convenience in his favour.

74. As I have discussed earlier it is not equitable to grant injunctive relief considering laches and or application of limitation by analogy to specifically perform sale and purchase agreement of 1.4.2009. Time was the essence of the said agreement and settlement was within ninety day time period.

75. Due to reasons given, summons for injunction is struck off, but Defendant cannot evict Plaintiff arbitrary manner, without court order.

CONCLUSION

76. Plaintiff and Defendant had entered in to sale and purchase agreement on 1.4.2009, where time was the essence. Plaintiff had paid the deposit of $20,000. Settlement time was ninety days but no evidence of presenting remaining payment to Defendant. Plaintiff had lodged a caveat and not taken steps to extend it. Plaintiff had after five years had sought specific performance, but this action was struck off due to failure to prosecute. Again, Plaintiff had instituted this action seeking transfer of the Land upon payment of sum agreed in sale and purchase agreement of 1.4.2009 where time was the essence. It is not equitable to grant injunctive relief to Plaintiff considering the circumstances of this case, as discussed. Summons for injunctive relief struck off, but Defendant needs to follow legal process to evict Plaintiff. No cost awarded considering circumstances of the case.

FINAL ORDERS

a. Summons for injunctive relief is struck off.
b. Interim order granted on 5.12.2022, till final determination of summons for injunction is accordingly dissolved.

c. No cost awarded considering circumstances of this case.

Dated at Suva this 15th day of February 2023.

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Justice Deepthi Amaratunga
Judge High Court, Suva