IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 117 of 2021

BETWEEN : **SHIREEN NISHA KHAN and MUKDUM KHAN** of Field 40 Subdivision, Lautoka, Police Officer and Welder/Metal Fabrication respectively.

PLAINTIFFS

A N D : **DIVENDRA SINGH** of Field 40 Subdivision, Lautoka, Accountant.

FIRST DEFENDANT

A N D : **COUNTRY HOMES REAL ESTATE** of Lautoka.

SECOND DEFENDANT

A N D : **HOUSING AUTHORITY** a statutory body established by Housing Authority Act (Cap. 267) having its registered office at Suva in Republic of Fiji Islands.

THIRD DEFENDANT

Before : Master U.L. Mohamed Azhar

Counsels : Ms. S. Begum for the Plaintiffs
Mr. S. Nand with Ms. D. Nair for the First and Second Defendants
Ms. S. Ravai for the Third Defendant

Date of Ruling: 28.03.2024

RULING

01. The plaintiffs entered into a Sale and Purchase Agreement with the first defendant on 05 February 2020 through a common solicitors to purchase the property described in Housing Authority Sub-Lease No. 598985, Lot 30 on DP 9150 in the Province of Ba, in the Tikina of Vuda, having an area of 228m^2 (the subject property). The second

defendant was the real estate agent in this dealing between the plaintiffs and the first defendant. The consideration was $ 240,000 and the purchase was later completed.

02. The plaintiffs then sued the defendants for damages. The plaintiffs claim return of $ 80,000 a portion of purchase price and damages against the first and second defendants on ground of fraudulent misrepresentation and hiding the defects on the subject property. The damages against the third defendant is based on the ground that the third defendant beached its ordinary duties as the Head Lessor.

03. The defendants filed their respective statement of defence completely denying the allegations and moved the court to dismiss the plaintiffs' action. The first and second defendant filed a summons pursuant to Order 18 rule 18 (1) (a) of the High Court Rules in addition to the defence and moved the court to strike the plaintiffs' action, in addition to their statement of defence.

04. The law on striking out of pleadings is well settled. The Order 18 rule 18 of the High Court Rule gives the discretionary power to strike out the proceedings for the reasons mentioned therein. The said rule reads:

> 18 (1) The Court **may** at any stage of the proceedings **order to be struck out or amend** 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
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> (b) It is scandalous, frivolous or vexatious; or
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> (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.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a).
>
> (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading (emphasis added)

05. The unambiguous wording of the above rule makes its effect very clear that, the power to strike out the pleadings is permissive and not mandatory. Even though the court is satisfied on any of those grounds mentioned in the above rule, the pleadings should not necessarily be struck out as the court can, still, order for amendment. The underlying rational is that, the access to justice should not, merely, be denied by glib use of summery procedure of pre-emptory striking out.

06. Marsack J.A. in his concurring judgment in **Attorney General v Halka** [1972] 18 FLR 210, explained how the discretionary power to strike out should be exercised by the courts and held that:

> "Following the decisions cited in the judgments of the Vice President and of the Judge of the Court below I think it is definitely established that the jurisdiction to strike out proceedings under Order 18 Rule 18 should be very sparingly exercised, and only in exceptional cases. It should not be so exercised where legal questions of importance and difficulty are raised".

07. No evidence is required when a summons is filed pursuant to Order 18 rule 18 (1) (a) of the High Court Rules. It is the allegations in the pleadings alone that are to be examined **Razak v. Fiji Sugar Corporation Ltd** [2005] FJHC 720; HBC208.1998L (23 February 2005).

08. The first and second defendants argued that, the plaintiffs on their own will included the negative/restrictive clause not to claim any damages or compensation for any defect and therefore they do not have a cause of action against the defendants to sue for damages for any defect either latent or patent.

09. The first and second defendants pleaded in their statement of defence the Clauses 11.1 and 11.2 of the Sale and Purchase Agreement the plaintiffs entered into with the first defendant through the common solicitor. These two Clauses read:

> 11.1. The Purchaser acknowledges that the Purchaser has caused the said property to be inspected and that the same is being purchased solely and completely in reliance upon the Purchasers own judgment and not due to any representation or warranty made by the Vendor or any agent of the Vendor.
>
> 11.2. The Purchaser has inspected the property and will, on the date of settlement, be deemed to be satisfied regarding all defects both latent and patent and will make no objection, requisition or claim for compensation

> or claim any right to rescind or terminate the Agreement in relation to a defect or delay completion because of a defect.

10. There is no dispute that, these clauses were in the Sale and Purchase Agreement between the plaintiffs and the first defendant. A cursory reading of these Clauses reveals that the plaintiffs clearly admitted and stated in unambiguous terms that, they purchased the subject property solely and completely in reliance upon their own judgment and not due to any representation or warranty either from the first defendant or his agent. The plaintiffs further went on their covenants and admitted that, they had already inspected the property and satisfied regarding all latent and patent defects of the property. Thereafter, the plaintiffs negatively covenanted that they will not make any objection or claim for compensation or termination of or rescinding the agreement due to any defect.

11. Generally, negative/restrictive covenants in an agreement limits or restricts one party in the agreement from taking specific actions. The restrictive/negative covenants are allowed in land sale as far as the law permits (for example see: Part VII of the Land Transfer Act). The courts have repeatedly emphasized that, if the contracting parties, on their free will and with clear understanding, agree to certain negative covenants, the courts have no discretion but to enforce the same except in cases of obscurity, illegality or on the grounds of public policy.

12. In **Doherty** v **Allman** (1878) 3 AC 709 the House of Lords was dealing with the injunction involving a negative clause and Lord Cairns L.C. held at pages 719 and 720 that:

> ..if there had been a negative covenant, I apprehend, according to well-settled practice, a Court of Equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties

13. Lord Donaldson MR in **Attorney General** v **Baker** [1990] 3 All ER 257 followed the above decision in **Doherty** v **Allman** (supra) and stated at page 260 that:

> It is a simple case of someone who has entered into a negative covenant for a consideration where the covenant is not limited territorially and is not limited in time. As Nourse LJ pointed out in argument, in such circumstances the courts habitually enforce the covenant provided only

that the covenant itself cannot be attacked for obscurity, illegality or on public policy grounds such as that it is in restraint of trade.

14. The plaintiffs clearly stated that, they agreed to purchase the subject property solely and completely in reliance upon their own judgment and not due to any representation or warranty made by the Vendor or any agent of the Vendor. The agreement was for a valid consideration and they were satisfied with all the latent and patent defects of the subject property and then decided not to make any claim in respect of any defect in the subject property. The covenant is clear; not illegal; and nor it is contrary to any ground of public policy. The court should enforce it. The rationale is that, the parties are bound by the express provisions of their contract, and the courts respect the sanctity of the contract. Accordingly, the plaintiffs, who negatively covenanted by an express and voluntary contract, cannot sue the defendants in the way this case is instituted. The plaintiffs' case is unarguable.

15. Salmon LJ said in **Nagle v Feilden** [1966] 1 All ER 689 at 697:

> 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable'.

16. It is also evident from "the covenant to sell and purchase" in Clause 1 of the Sale and Purchase Agreement between them that, the plaintiffs purchased the subject property on an "as is where is" basis for the consideration stated therein. When a property is sold on an "as is where is" basis, the vendor makes no warranties as to the condition of the property. The purchaser acknowledges, by this agreement, that he or she inspected or has had an opportunity to inspect the property and agrees to accept it 'as it is'. In this case, the purchaser has no right to set off or reduction in the purchase price.

17. This position is obvious from the Clause 11.1 and 11.2 of the Sale and Purchase Agreement between the plaintiffs and the first defendant. The plaintiffs inspected the subject property and were satisfied regarding all defects both latent and patent of it. The plaintiffs therefore cannot say that, they relied on the representation made by the first and second defendants in relation to the condition of the subject property. The plaintiff voluntarily entered into those covenants and they are bound by them. Accordingly, the cause of action as pleaded in the statement of claim is obviously unsustainable.

18. It was held in **Ratumaivale v Native Land Trust Board** [2000] FJLawRp 66; [2000] 1 FLR 284 (17 November 2000) that:

> "It is clear from the authorities that the Court's jurisdiction to strike out on the grounds of no reasonable cause of action is to be used sparingly and only where a cause of action is obviously unsustainable. **It was not**

> **enough to argue that a case is weak and unlikely to succeed**, it must be shown that no cause of action exists (**A-G v Shiu Prasad Halka** [1972] 18 FLR 210; **Bavadra v Attorney-General** [1987] 3 PLR 95". (Emphasis added).

19. Citing several authorities, Halsbury's Laws of England (4th Edition) in volume 37 at para 18 and page 24, defines the reasonable cause of action as follows:

> "A reasonable cause of action means a cause of action with some chance of success, when only the allegations in the statement of case are considered" Drummond-Jackson v British Medical Association [1970] 1 ALL ER 1094 at 1101, [1970] 1 WLR 688 at 696, CA, per Lord Pearson. See also Republic of Peru v Peruvian Guano Co. (1887) 36 ChD 489 at 495 per Chitty J; Hubbuck & Sons Ltd v Wilkinson, Heywood and Clark Ltd [1899] 1 QB 86 at 90,91, CA, per Lindley MR; Hanratty v Lord Butler of Saffron Walden (1971) 115 Sol Jo 386, CA.

20. His Lordship the former Chief Justice A.H.C.T. Gates in **Razak v. Fiji Sugar Corporation Ltd** (supra) held that:

> "The power to strike out is a summary power "which should be exercised only in plain and obvious cases", where the cause of action was "plainly unsustainable"; Drummond-Jackson at p.1101b; A-G of the Duchy of Lancaster v London and NW Railway Company [1892] 3 Ch. 274 at p.277."

21. For the reasons mentioned above, I am of the view that, the plaintiffs who voluntarily entered into a contract with negative covenants are bound by their covenants. They solely relied on their own judgment in purchasing the subject property. The claim that, they relied on the representation of the first and second defendants is unsustainable. Therefore, they do not have a cause of action against first and second defendants at all.

22. The third defendant only filed the statement of defence and moved the court to dismiss the plaintiffs' action. However the third defendant did not file the summons for striking out. The question is whether court can strike out the plaintiffs' action against the third defendant in the absence of the summons for the same? The Order 18 rule 18 in its unambiguous language, gives discretion to the court either to strike out or order for amendment of pleading etc. It neither states that, the jurisdiction to be invoked by any party, nor does it state that, the court may act on its own motion.

23. The court is not prevented from acting on its own motion. However, the court does not act on its own motion to avoid possible allegation of bias. In any event the jurisdiction

has been invoked by the first and second defendants. The court is, after examination of the relevant materials, of the view that, the plaintiffs acted on their own wish and volition and they did not rely on the any representation of the first and second defendants. In this circumstances, the plaintiffs cannot allege breach of duty by the third defendant. The cause of action as pleaded in the statement of claim against the third defendant too is unsustainable.

24. The first and second defendants sought the costs against the plaintiffs on the indemnity basis. The plaintiffs acted on their own and took the risk of all latent and patent defects of the subject property. The subject property was in their control for more than a year till they commenced this proceedings against the defendants. The conduct of the plaintiffs is reprehensible to a certain level which can warrant indemnity costs. However, I decide that the summarily assessed costs on higher scale is sufficient to this circumstance as the matter is still on pleading stage.

25. In result, I make the following orders,

    a. The plaintiffs' action against all the defendants is struck out, and

    b. The plaintiffs should pay a summarily assess costs in sum of $ 2000 to each defendant within a month from today.

HIGH COURT OF FIJI
LAUTOKA

U.L Mohamed Azhar
Master of the High Court

At Lautoka
28.03.2024