IN THE HIGH COURT AT SUVA

IN THE CENTRAL DIVISION

CIVIL JURISDICTION

Civil Action No. HBC 50 of 2019

BETWEEN: **LARRY CLAUNCH**

PLAINTIFF/RESPONDENT

AND: **ONE HUNDRED SANDS**

FIRST DEFENDANT/APPELLANT

AND: **TIMOTHY MANNING**

SECOND DEFENDANT/APPELLANT

Date of Hearing	**:**	**2 August 2024**
For the Plaintiff	**:**	**Mr Haniff. F**
Counsel for the Defendants	**:**	**Mr Singh. S**
Date of Decision	**:**	**25 November 2024**
Before	**:**	**Waqainabete-Levaci S.L.T.T, J**

J U D G E M E N T

(APPLICATION FOR STRIKING OUT)

BACKGROUND

1. There are three interlocutory applications pending before me. They were heard simultaneously and stems from the same facts of this case.

2. The initial application for striking out of the 2nd Defendant was heard on the 15th July 2024.

3. The two applications for joinder of party and leave to serve outside of jurisdiction was heard together on 2 August 2024.

4. I had initially announced in Court that I would deliver my Rulings together, in hindsight, I find this appropriate in these circumstances.

5. The Second Defendant/Applicant filed an application for Striking Out together with an affidavit seeking the following Orders:

    (a) That the Statement of Claim/Originating Summons and related affidavit discloses no reasonable cause of action against the Second Defendant; and /or

    (b) That it is an abuse of process, scandalous, frivolous and vexatious.

6. The Orders sort in the Originating Summons are as follows:

    (i) Specific Performance of the Share Sale and Purchase Agreement entered on 3 March 2014 by the 2nd Defendant;
    (ii) Order entitling the Plaintiff to recover the option fee and deposit of $1.2 million FJD;
    (iii) An order that the 1st, 2nd and 3rd Defendants promptly transfer $1.2 million FJD to the Plaintiff;
    (iv) Costs.

7. The Plaintiff is a Director and holds majority shares of One Hundred Sands LLC, a company incorporated in the State of Dellaware, USA, which has 50% shares in the First Defendant together with HGW International Ltd.

8. HGW International Limited, a company incorporated in New Zealand, is owned by the Second Defendant.

9. On 7 October 2011, a Sale and Purchase Agreement was entered between Te Arawa Limited and the First Defendant for the purchase of Native Lease No. 434878. The Plaintiff had intended to establish a Hotel and Casino with Joint Venture from another investor.

10. The purchase price was $1.2 million (FJD) with $200,000 (FJD) as option fee payable on execution and $1 million (FJD) payable when the option was exercised.

11. The Plaintiff had personally paid the $1.2 million (FJD) to the First Defendant.

12. On 17 April 2013 a Heads of Agreement was entered into where the First Defendant would obtain all the required licences and permits, Norwich Properties Limited would give the First Defendant $30 million USD as their equity contribution to the casino project in exchange for 50% share ownership in the First Defendant. A Funding and Investment Proposal was entered on 30 October 2013 by the two companies to further the Heads Agreement.

13. A Subscription Agreement in respect of Ordinary Shares was entered into on 19th November 2013 between the First Defendant, HGW International Limited, and One Hundred Sands LLC.

14. HGW International Limited had agreed to provide funding of $30 million USD to First Defendant for the development and management of the casino in Suva and Nadi in exchange for 2.4 million ordinary shares from First Defendant.

15. The purchase of the casino site did not eventuate and no settlement was finalized as per the Sale and Purchase Agreement entered into on 7 October 2011 with Te Arawa Limited refusing to return the deposit paid by the First Defendant.

16. In a decision on 3 May 2018, the Court determined that the deposit was to be refunded back to the First Defendant.

SUBMISSION BY THE PARTIES

17. In their application, the 2nd Defendant/Applicant's Counsel referred to the Originating Summons dated 15th February 2019 and the Affidavit in Support of Vukincanavanua Rokodreu as well as the Substantive Affidavit of the 2nd Defendant/Applicant on 8th March 2019.

18. The Originating Summons seeks for reliefs of specific performance for the Share Sale Agreement dated 3 March 2014 between the Plaintiff and 2nd Defendant.

19. However the parties in the Agreement are One Hundred Sands LLC and HGW International Limited. The Plaintiff cannot enforce the principles of specific performance and privity of contract as the 2nd Defendant/Applicant is not a party to any of the Agreements.

20. There is nothing as well from the pleadings that holds the 2nd Defendant/Applicant personally liable for their actions.

21. The second ground relied upon by the Second Defendant/Applicant for striking out is that the loan advanced by the Plaintiff for $1.2 million to the 1st Defendant to pay for the purchase of the property which is now the debt claimed by the Plaintiff is contrary to Section 4 of the Limitations Act which provides that all claims must commence within 6 years.

22. In reply the Plaintiff/Respondents argue that for the purposes of the Limitations Act that issues should be determined at trial and cannot be determined by summary proceedings. The cause of action and the basis of the agreement should be considered in light of the evidences.

23. In reply Counsel for the 2nd Defendant/Applicant argued that Order 18 Rule 18 (1) of the High Court Rules empowers the Court to strike out pleadings at any stage of the proceedings or to amend the pleadings.

LAW ON STRIKING OUT

24. Order 18 Rule 18 (1) of the High Court Rules reads :

> "(`1) The Court 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:
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> (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;
> (d) It is otherwise an abuse of the process of the court;
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> And may 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 in paragraph (1) (a)."

25. In the Supreme Court Practice (1988, Sweet and Maxwell, London, Vol 1) page 314 para 18/19/3 to 18/19/4 and 18/19/15:

> "It is only in plain and obvious cases that recourse should be had to the summary process under this rule per Lindley MR in Hubbuck –v- Wilkinson [1899] 1 Q.B 86, at page 91 (Mayor, etc, of the City of London -v- Horner (1914) 111 L.T 512 (1952) AC 345, H.L. The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it ''obviously unsustainable' (Att.-Gen of Ducky of Lancaster -v- L.& N.W.Ry. Co. [1892] 3. Ch. 274, C.A). The summary remedy under this rule is only to be implied in plain and obvious cases when the action is one which cannot succeed or is some way an abuse of the process or the case unarguable (see per Dunkkwerts and Salmon L.JJ.)
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> Where an application to strike out pleadings involves a prolonged and serious argument, the Court should, as a rule decline to proceed with the argument unless it only harbours doubts about the soundness of the pleadings but, in addition, is satisfied that striking out would obviate the necessity for a trial and therefore where the Court is satisfied, even after substantial argument both at first instance and on appeal, the defence does not disclose a reasonable ground of defene, it will order it to be struck out (Williams & Humbert –v- W & H Trademarks (Jersey) Ltd [1986] A.C 368 [1986] 1 ALLER 129; H.L affirming [1985] ALL ER .
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> "**Frivilous and vexatious** By these words are meant cases which are obviously frivolous or vexatious unsustainable per Lindley LJ - Att.-Gen of Ducky of Lancaster -v- L.& N.W.Ry. Co. [1892] 3. Ch. 274, C.A)
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> "**Abuse of process of the Court** Confers upon the Court in express terms powers which the Court hitherto exercised under its inherent jurisdiction where there appears to be 'an abuse of the process of the Court'. This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a vexation or oppression in the process of litigation"

26. The power to exercise this provision is discretionary and not mandatory.

27. In Pacific Islands Air Pte Ltd -v- Simon [2024] FJCA 30; ABU040.2021 (29 February 2024) Jameel JA, Jitoko JA and Clark JA held that:

> "[39] In taking the extreme step of **striking out** the Statements of Defence and Counterclaims, the court had to be satisfied that the conduct of the Appellants unequivocally showed that they had deliberately failed to appear in court with the intention of thwarting the proceedings, that they did not intend to diligently pursue their defence and Counterclaim, and their non-appearance was contumelious, leaving the court with no option, but to conclude that the interests of justice required it to exercise its discretion to strike out the Statement of Defence and the Counterclaim and enter Default Judgment However, in this case the court overlooked relevant considerations and sped to a conclusion that was at variance with the relevant facts. Thus, **striking out** the Statements of Defence and Counterclaims and entering Default Judgment against the unwittingly absent Appellants, and the subsequent refusal to set aside a Default Judgment entered in such circumstances, was not a fair exercise of discretion. In the result, the Appeal is allowed.
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> ***Conclusions***
> [40] Whilst the conduct of the Solicitors could be regarded as careless, or even arising out of an unjustified assumption, in fact the absence was due to a genuine and valid reason, and in the absence of an unless order, the **striking out** of the Statements of Defence and Counterclaims and the entering of Default Judgments, was totally disproportionate and highly prejudicial to the parties' interest. In these circumstances, justice required the Default Judgments should have been set aside promptly. Accordingly, ground 4 of the grounds of appeal is allowed."

ANALYSIS

28. The Court considered the submissions by both parties as well as their oral arguments in Court.

29. The Applicants grounds for striking out is on the basis that there is no cause of action against them, the claim is misconstrued and that the appropriate parties to be sued is the company.

30. The Court had perused the Originating Summons as well as the Affidavits.

31. The parties to all these Agreements are the companies and not the Second Defendant/Applicant. Although the Second Defendant/Applicant is a Director/Shareholder of HGW International Limited and Norwich Limited, there is no claim by the Plaintiff against the 2nd Defendant/Applicant personally.

32. It is not disputed that the Second Defendant/Applicant is a Director of one of the companies. However this in accordance with the Articles and Memorandum of Agreement between the companies and the Directors appointing them to administer and manage the company.

33. There is therefore no cause of action against the 2nd Defendant/Applicant in his personal capacity.

34. The second ground for striking out proceedings is that the claim for monies of $1.2 million that was advanced to the First Defendant was given in 2011 which the 2nd Defendant/Applicant argues is outside of the Limitations Act.

35. The Court considered this preliminary issue of law.

36. The Limitations Act empowers the court to strike out an action if the debt accrued outside of the Limitations Act.

37. According to Justice Alfreds decision in the case of One Hundred Sands Limited -v- Te Arawa Limited HBC 112 of 2014, held that Howards Lawyers were to pay the Plaintiff the $1.2 million and for the Defendant to pay costs of $5000 for which stay was refused on Appeal[1]. That the option was exercisable in 2012.

38. The Plaintiff is now claiming for the $1.2 million owing from the First Defendant as a refund for his equitable investment into the Joint Venture through the Head Agreement and Subscription Agreements that were all entered into in 2013.

39. The Court finds these are preliminary issues of law that can be dealt with at trial.

40. The issues pertaining to the claim in the summons is not regarding the exercise of the Sale and Purchase Agreement. It is to do with the Head and Subscription agreement for which the parties are now claiming against the Defendants.

[1] Te Arawa Limited –v- One Hundred Sands Limited ABU 34 of 2018

41. I am satisfied that this is an issue that falls outside of the Limitations Act.

42. However the Court is satisfied, that in any event, the Second Defendant/Applicant is not personally liable for the claim made against him nor is he a party to the Agreements which had given rise to this claim.

43. I will therefore order that the claim against the Second Defendant be struck off.

44. This matter has been pending for some time and the Second Defendant/Applicants had filed their Affidavits in Opposition initially deposing that they were never personally liable for the Agreements. I will therefore impose costs against the Plaintiff.

COURT ORDERS

45. Court will therefore Order that:

(i) The claim against the Second Defendant be struck off;

(2) Costs against the Plaintiff to be paid to the Second Defendant/Applicant for $2000 payable in 30 days.

HIGH COURT OF FIJI
SUVA

Mrs Senileba LTT Waqainabete-Levaci
Puisne Judge