IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 273 OF 2024

BETWEEN: **BRENDAN HANNON**
PLAINTIFF

AND: **BARON BRUNO**
DEFENDANT

BEFORE	: Mr. A.M. Mohamed Mackie-J.
COUNSEL	**:** Mr. Wainiqolo **-**For the Plaintiff.
	: Ms. Ali. A. For the Defendant.
DATE OF HEARING	: On 7th November 2024.
WRITTEN SUBMISSIONS	: Filed by the Plaintiff on 28th November 2024.
	: Filed by the Defendant on 26th November 2024.
DATE OF RULING	: On 6th December 2024.

RULING

(On Application for Striking Out)

A. INTRODUCTION:

1. The plaintiff on 31st October 2024 filed his writ of Summons and the Statement of Claim (SOC) against the Defendant seeking, ***inter alia***, the following reliefs;

    1. ***For an injunction*** *against the Defendant and for his agents and servants from interfering in anyway with the Transfer and Settlement of Native Lease No. 28665 located at Tai Island, Lot 1 on ND 4781, Tikina of Vuda, Province Ba with an area of 6 acres and 3 roads.*

    2. ***A DETERMINATION*** *whether the Listing Authority Agreement dated 4th June 2021 is still valid and enforceable.*

    3. ***A DECLARATION*** *on whether the Defendant is entitled to any Commission for the sale of Native Lease No. 28665 located at Tai Island, Lot 1 on ND 4781, Tikina of Vuda, Province Ba with an area of 6 acres and 3 roads under the terms of the Listing Agreement.*

    4. ***A DECLARATION*** *that the Defendant be made to pay costs of this application.*

2. Simultaneously, the Plaintiff also filed an **Ex-parte Notice of Motion**, supported by an Affidavit sworn by the Plaintiff, namely, Brendon **Hannon**, and filed with documents marked from "**A"** to **"M"**, seeking, *inter alia,* the following Orders against the Defendant.

    1. ***PERMANENT INJUNCTION*** *against the Defendant and/or his agents and servants from interfering in anyway with the Transfer and Settlement of Native Lease No. 28665 located at Tai Island.*

    2. ***A DECLARATION and DETERMINATION*** *on whether the Listing Authority Agreement dated 04th June, 2021 is still valid and enforceable to date.*

    3. ***A DECLARATION*** *on whether the Defendant is entitled to any Commission for the sale of Native Lease No. 28665 under the terms of the Listing Agreement.*

    4. ***AN ORDER*** *that the Defendant be made to pay costs of this application.*

3. The Ex-Parte Notice of Motion did not state as to under which Order and Rule of the High Court Rules 1988 it is filed. However, since the Injunctive Order sought as per paragraph 1 thereof was permanent in nature, the Court directed the matter to be supported inter-partes on 7th November 2024.

4. Accordingly, when the matter came up on 7th November 2024 for inter-partes hearing on the Notice of Motion, learned Counsel for the Defendant,, having filed and served the Notice of Appointment, Notice of Intention to Defend and a Summons to Strike Out Plaintiff's Writ of Summons, SOC and the Inter –Parte Notice of Motion, moved the Court to Strike Out the Plaintiff's action.

5. As the injunctive relief sought was a permanent one, which can only be considered as a final relief at the end of the matter, after hearing to the oral submissions of both counsel on the Defendant's striking out Application, the Court directed them to file written submissions on it.

B. PRESENT APPLICATION:

6. The Application under consideration is the Summons for Strike Out, preferred by the Defendant, pursuant to Order 18 Rule 18 (1) (a) of the High Court rules 1988, determination of which does not require evidence.

C. BACKGROUND FACTS IN BRIEF:

7. The Statement of Claim , *inter alia,* states THAT:

    a. The plaintiff is the owner of Tai Island and the Operator of Beachcomber Island Resort Limited, which is comprised in Native Lease No. 28665. The Defendant is a real Estate agent operating from Denarau in Nadi.

b. On 4th June 2021, the Plaintiff entered into a Listing Authority Agreement (LAA) with the Defendant's Company to list the above property and sale of it for the price of FJD $ 24,500,000.00 (Twenty Four Million Five Hundred thousand Fijian Dollars) and the agreed sale Commission was 4% of the said sale price.

c. Though, there was no buyers till the end of 2022, the Defendant sometimes in 2023 introduced the "Vision Group Pty Limited , an Australian Company, to buy the Land, who had offered only FJD $19,350,000.00 , but later withdrawn.

d. As there was no potential buyers in sight, the Plaintiff on 27th June 2023 cancelled the Defendant's LAA as he had failed to complete the sale with Vision Group Pty Limited.

e. After many discussions and negotiations, the Plaintiff entered into a Sale and Purchase Agreement with two other buyers, namely "Coconut Dreams Pvt Ltd to purchase the Island for FJD $ 17,000,000.00 and "Restless Pte Ltd" to purchase the Chattels for a sum of FJD $2000,000.00.

f. From 2nd September 2024 and thereafter, the Plaintiff's Solicitors received several emails from the Defendant's Solicitors seeking information on the transfer process, as to when the 4% Commission will be paid and undertaking for the payment of the agreed Commission.

g. His Whats-App discussions with the Defendant and the agreement on commission was for the sale of the land to Vision Group Pte Ltd for a lesser offer and had nothing to with the current sale. However, due to the fact that this Transfer must proceed, he gave consent to his Solicitor to undertake the payment of 4% Commission less AUD $ 150,000.00 to the Defendant.

h. When the conveyance is now ready for settlement, to the Plaintiff's great surprise, the Defendant's Solicitors threatened the Plaintiff's Solicitors to place a Caveat on the title and take out injunction to stop the settlement process. The Defendant's Solicitors continued to send threatening emails.

i. The Plaintiff cannot allow the Transfer process to be derailed by the Defendant and his Solicitors as the purchaser has already spent substantial amount of money on the land ahead of the Transfer.

j. He undertakes to pay damages to the Defendant.

D. LAW ON STRIKE OUT:

8. Provisions relating to striking out are contained in Order 18, rule 18 of the High Court Rules, 1988, which reads as follows;

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) 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.

(2) No evidence shall be admissible on an application under paragraph (1) (a).

(2). Footnote 18/19/3 of the 1988 Supreme Court Practice reads;

> *It is only 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, p91 Mayor, etc., of the City of London v Homer (1914) 111 L.T, 512, CA). See also Kemsley v Foot and Qrs (1952) 2KB. 34; (1951) 1 ALL ER, 331, CA. affirmed (195), 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 Duchy of Lancaster v L. & N.W. Ry Co (1892)3 Ch 274, CA). The summary remedy under this rule is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process or the case unarguable (see per Danckwerts and Salmon L.JJ in Nagle v Feliden (1966) 2. Q.B 633, pp 648, 651, applied in Drummond Jackson v British Medical Association (1970)1 WLR 688 (1970) 1 ALL ER 1094, CA .*

(3) Footnote 18/19/4 of the 1988 Supreme Court Practice reads;

> *"On an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute (Wenlock v Moloney) [1965] 1. WLR 1238; [1965] 2 ALL ER 87, CA).*
>
> *It has been said that the Court will not permit a plaintiff to be "driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad (per Fletcher Moulton L.J. in Dyson v Att. – Gen [1910] UKLawRpKQB 203; [1911] 1 KB 410 p. 419)."*

(4) In the case of Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641, it was held**;**

> "The jurisdiction to strike out a pleading for failure to disclose a cause of action is to be sparingly exercised and only in a clear case where the Court is satisfied that it has all the requisite material to reach a definite and certain conclusion; the Plaintiff's case must be so clearly untenable that it could not possibly success and the Court would approach the application, assuming that all the allegations in the statement of claim were factually correct"

(5) In the case of National MBF Finance (Fiji) Ltd v Buli [2000] FJCA 28; ABU0057U.98S (6 JULY 2000), it was held;

> *"The law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. It follows that an application of this kind must be determined on the pleadings as they appear before the Court".*

(6) In Tawake v Barton Ltd [2010] FJHC 14; HBC 231 of 2008 (28 January 2010), Master Tuilevuka

(as he was then) summarised the law in this area as follows;

"The jurisdiction to strike out proceedings under Order 18 Rule 18 is guardedly exercised in exceptional cases only where, on the pleaded facts, the plaintiff could not succeed as a matter of law. It is not exercised where legal questions of importance are raised and where the cause of action must be so clearly untenable that they cannot possibly succeed (see Attorney General –v- Shiu Prasad Halka 18 FLR 210 at 215, as per Justice Gould VP; see also New Zealand Court of Appeal decision in Attorney –v- Prince Gardner [1998] 1 NZLR 262 at 267."

E. ANALYSIS & DETERMINATION:
The Issue For determination.

9. The issue before the Court, as per the Defendant's Summons for strike out the Plaintiff's Writ of Summons and Statement of Claim, is whether the latter discloses a reasonable cause of action or any cause of action at all and, if it does not discloses, whether it ought to be struck out with costs.

Defendant's Submissions.

10. Counsel for the Defendant has advanced forceful arguments, *inter alia*, as follows.

    a. *The Statement of Claim must plead facts that support the legal conclusion sought by the Plaintiff. A mere recitation of facts, without connecting those facts to a legally recognised cause of action is insufficient.*

    b. *That the Statement of claim, even if considered as a whole, is vague and incapable of being comprehended in terms of legal issues at stake. The facts presented are disjoined and fail to show how they relate to any particular cause of action or how they give rise to any legal right.*

    c. *Pleadings must be drafted with sufficient clarity so as to enable the Defendant to understand the nature of the claim and to properly defend it. In this case the plaintiff's SOC does not meet this requirement. The Defendant cannot discern from the SOC what specific claim is being made or how the facts alleged are linked to any enforceable legal right.*

    d. *That the failure to plead a proper cause of action in the SOC is prejudicial to the Defendant, as it forces the Defendant to attempt to defend against an unarticulated and vague claim.*

    e. *The Defendant has a right to know the precise legal grounds upon which the Plaintiff's claim is based. The absence of a discernible cause of action prejudices the Defendant's ability to respond adequately and to make an informed decision on whether to settle or defend the matter.*

    f. *It is an abuse of the process of the Court and striking out will ensure that the Court's resources are not consumed by vague or improper pleadings that do not raise a valid legal issue.*

Plaintiff's Submissions:

11. What the learned Counsel for the Plaintiff in his written submissions has urged is that :

    a. *The Defendant has failed to confer and seek clarification from the Plaintiff on "Further and better particulars". Contrastingly, its extreme position to file a Summons for Strike Out, notwithstanding its oral application on the same date to the Court for oral hearing is viewed by the Plaintiff with utmost opposition and protest.*

    b. *That the Application for strike by the Defendant is an extreme measure and should only be considered as a last resort; after all available avenues under the law have been exhausted.*

    c. *To exhaust the same, at the first available opportunity is in itself viewed as an abuse of process, infringing, inter alia, the Plaintiff's constitutional right to having the matter determined by a court of law.*

    d. *Notwithstanding the Defendant's application for Striking Out, Plaintiff has the right to invoke Order 20 Rule 5 of the High court Rules 1988 to amend the pleadings with leave.*

12. As noted above, the Courts rarely will strike out a proceeding. It is only in exceptional cases where, on the pleaded facts, the Plaintiff could not succeed as a matter of law or where the cause of action is so clearly untenable that it cannot possibly succeed the courts will act to strike out a claim.

13. In this regard, I am inclined to be guided by the decision of the New Zealand Court of Appeal in "Lucas & Sons (Nelson Mail) v O. Brien (1978) 2 N.Z.L.R 289 as being a convenient summary of the correct approach to the application before the court. It was held;

    "The Court must exercise .....jurisdiction to strike out pleadings sparingly and with great care to ensure that a Plaintiff was not improperly deprived of the opportunity for a trial of his case. However, that did not mean that the jurisdiction was reserved for the plain and obvious case; it could be exercised even when extensive argument was necessary to demonstrate that the Plaintiff's case was so clearly untenable that it could not possibly succeed."

    "Where, a claim to strike out depends upon the decision of one or more difficult points of law, the court should normally refuse to entertain such a claim to strike out. But, if in a particular case the court is satisfied that the decision of the point of law at that stage will either avoid the necessity for trial altogether or render the trial substantially easier and cheaper ; the court can properly determine such difficult point of law on the striking-out application. In considering whether or not to decide the difficult question of law, the court can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in light of the actual facts of the case" See; **Williams & Humber Ltd v H Trade markers (jersey) Ltd (1986) 1 All ER 129 per Lord Templeman and Lord Mackay.**

14. A striking-out application pursuant to Order 18 Rule 18 (1) (a) proceeds on the assumption that the facts pleaded in the Statement of Claim are true. That is so even though they are not or may not be admitted. However, it is permissible to refer to Affidavit evidence where the evidence is undisputed and is not inconsistent with the pleadings.

15. As far as the present Application in hand is concerned, in my view, the facts pleaded in the Statement of Claim are sufficient and appropriate to determine a question of law hereof.

16. However, I have before me an Affidavit by the Plaintiff with 13 annexures, which came to be filed in support of injunctive reliefs, but remains unutilized as the injunctive relief sought is a permanent one, which can be granted only at the end of the substantive matter.

17. In Attorney-General v McVeagh [1995] (1) NZLR 558 at 566. The Court said:

> *"The Court is entitled to receive Affidavit evidence on a striking-out application, and will do so in a proper case. It will not attempt to resolve genuinely disputed issues of fact and therefore will generally limit evidence to that which is undisputed. Normally it will not consider evidence inconsistent with the pleading, for a striking-out application is dealt with on the footing that the pleaded facts can be proved; see Electricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641, 645-646, Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries [1993] 2 NZLR 53 at pp 62-63, per Cooke P. But there may be a case where an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further".*

18. As alluded to above, the Defendant's Application is made under Order 18, Rule 18 (1) (a) of the High Court Rules, 1988 and under the inherent jurisdiction of the Court. There is no rule that Affidavit evidence cannot be admitted. Therefore, it is permissible to refer to Affidavit evidence of the Plaintiff.
    Given.

19. On careful perusal of the averments in the SOC, those of the Affidavit and the contents of the annexures thereto, I find that the Plaintiff, through his Solicitors, has given an undertaking to pay the Defendant a certain amount as his commission, despite his claim that he had already cancelled "Listing Authority Agreement" with the Defendant. The purported cancellation is not supported by any evidence. (**Vide the averments in paragraphs 24 to 26 of the Affidavit and paragraphs 14 & 15 of SOC).** In view of the above undertaking, I find no room for any serious issues between the parties for the Court to adjudicate at the end of the day.

20. The main relief sought by the Plaintiff, as per the paragraph 2 of the prayers to his Statement of claim, is ***A DETERMINATION whether the Listing Authority Agreement dated 4th June 2021 is still valid and enforceable***. It is to be observed that granting of the other reliefs 1, 3 &4 sought in the prayer to the SOC squarely depend on the granting of the Declaration stated above. But, I find that the Plaintiff's undertaking to pay the Defendant's commission as a tacit admission on the part of the Plaintiff that the Listing Authority Agreement (LAA) with the Defendant remains intact. The Plaintiff cannot take two different stances in relation to the LLA. In view of the said undertaking by the Plaintiff to pay Defendant, the prayer No-2 above becomes redundant, leaving no issues for determination by the Court at the end of the day.

21. **In Khan v Begum (2004) FJHC 430, Hon. Justice John Connors said;**

"Quite part from the jurisdiction conferred by the Rules to strike out frivolous and vexatious pleadings and action where the cause of action is not revealed, the court also has a separate inherent jurisdiction, which is, relied on to control proceedings and to prevent an abuse of its process. Under the inherent jurisdiction, the court can, as it can under the provisions of the Rules, stay or dismissed proceedings which are an abuse of process as being frivolous or vexatious or which fail to show a reasonable cause of action"

(ii) The issues for consideration by the Court are the same whether pursuant to the Rules or in reliance of the inherent jurisdiction. They might summaries as to whether there is a reasonable cause of action.

(iii) Plaintiff Must Plead a Reasonable Cause of Action

22. In relation to the ground of "no reasonable cause of action ", paragraph 18/19//10 of the White Book states –
".... A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] WLR 688; [1970] 1 All ER 1094, CA."

What is a "Cause of Action"?

23. The High Court in Dean v Shah [2012] FJHC 1344, defined a cause of action in the following way;

"A cause of action is said to be a set of facts that gives rise to an enforceable claim by a Plaintiff. In Read v Brown [1888] UKLawRpKQB 186; 22 QBD 128 Esther M.R. States that a cause of action comprises every fact which if traversed the Plaintiff must prove in order to obtain Judgement. Lord Diplock in Letang v Cooper [1964] EWCA Civ 5; (1965) 1 QB 232 at 242-243 states that a cause of action:

".... Is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person"

24. The High Court in Dominion Insurance Ltd v Pacific Building Solutions [2015] FJHC 633, defined a cause of action to mean –

".... Any facts or series of facts which are complete in themselves to found a claim for relief. (Obi Okoye, Essays on Civil Proceedings, page 224 Art 110, cited in Shell Petroleum Development Company Nigeria Ltd & Anr v X.M. Federal Limited & Anr S.C. 95/2003)."

25. It is apparent from the authorities that the term "cause of action" means allegations of material facts which, if proved, will provide a complete foundation for a recognised type of claim. There are two aspects to consider: first, does the law recognise the Plaintiff's claim as one as an enforceable one, and if so, secondly do the material facts alleged if proved, give rise to a right to a remedy.

26. In this case, when the Plaintiff has recognised the Defendant's right to receive the sale commission and undertaken to pay. Accordingly, the Defendant should not be troubled by seeking

declarations and orders against him, which are bound to fail having regard to the uncontested facts. The most pivotal uncontested fact hereof is clear on perusal of the averments in the SOC, the Affidavit and the contents of the documents, which reveals the Plaintiff's undertaking and the commitment.

27. In those circumstances, particularly, in the absence of any cause of action and serious issues to be tried at the trial, it is pointless for the case to go on so that the Defendant can deliver a defense. The delivery of the defense and attending other formalities in Court is bound to waste the time and money.

28. Notwithstanding the very high standard and precautionary test that the authorities imposed on Application such as this and in applying these authorities to the facts and submissions in this matter, I am of the opinion that the Application for strike out should be granted. The Plaintiff's claim is bound to fail having regard to the facts hereof. I am of the opinion that the proceedings are vexatious and are an abuse of process of the Court.

29. For the reasons stated above, I stand convinced to say at this initial stage itself, that the Plaintiff's Statement of Claim does not raise debatable questions of facts. Any amendments to the SOC is not going to validate the Plaintiff's action against the Defendant. Therefore, it is competent for the Court to strike out the SOC and dismiss the Plaintiff's action on the ground that it discloses no reasonable cause of action against the Defendant.
30. On the other hand, the continuation of this action, even with an amendment to address the weaknesses in the Plaintiff's SOC, as submitted by the Plaintiff's Counsel, is bound to consume extensive time, which would, undoubtedly, delay and/ or derail the Plaintiff's move to dispose the property.

31. Accordingly, there is no alternative but to strike out the Statement of claim and dismiss the Plaintiff's action in order to protect the Defendant from being further troubled, to save the Plaintiff from further costs & disappointments, to relieve the Court of its burden and to avoid the waste its precious time and resources, which could be devoted to the determination of claims which have legal merits.

(F) <u>ORDERS:</u>

A. The Defendant's Summons dated and filed on 6th November 2024 for sticking out succeeds.

B. Plaintiff's Writ of Summons and Statement of Claim filed against the Defendant on 31st October 2024 is struck out.

C. The Civil Action No: - HBC 273 of 2024 is hereby struck out.

D. The Plaintiff to pay costs of $1500.00 (summarily assessed) to the Defendants within 14 days hereof.

On this 6th day of December 2024 at the High court of Lautoka.

A.M. Mohamed Mackie.
JUDGE
High Court (Civil Division)
Lautoka.

HIGH COURT OF FIJI
LAUTOKA

SOLICITORS:

For the Plaintiff- Law Solutions – Lawyers & Legal Consultants.

For the Defendant- Interalia Consultancy – Barristers & Solicitors.