IN THE HIGH COURT OF SOLOMON ISLANDS.

(R. Faukona, DCJ).

Civil Case No. 528 of 2019.

BETWEEN: PACIFIC PROPERTIES DEVELOPMENT LIMITED. **Appellant.**

AND: The COMMISSIONER OF INLAND REVENUE **Respondent.**

Date of Hearing: 18th October 2021.
Date of Ruling: 18th May 2022.

Mr. P. Afeau for the Appellant.
Mr. A. Poa for the Respondent.

RULING ON APPLICATION TO STRIKE OUT AND ON APPLICATION FOR LEAVE TO AMEND THE NOTICE OF APPEAL

Faukona DCJ: A notice of appeal was filed by the Appellant on 23rd September 2019 against the decision of the Commissioner of Inland Revenue disallowing the Appellant's objections to the default assessments conveyed by Notice dated 25th July 2019.

2. The Respondent had filed response on 30th October 2019.

3. From 19th March 2020 to 12th November 2020 time was given to the Appellant to settle the appeal papers. On 12th December 2020, Counsel for the Appellant emerged with two suggestion. One that he be given time to file and negotiate a possible settlement. Secondly that he is anticipating filing an amended notice of appeal pursuant to rule 16.31.

4. By 9th February 20201 a draft amended notice of appeal was placed on Court record. On 23rd March 2021 on application for leave to amend notice of appeal was filed.

5. On 17th March 2021, the Respondent filed an application to strike out the notice of appeal.

6. This Court is now vested with the task to hear and make determination on both applications. I will begin with the application to strike out filed by the Respondent.

Application to Strike Out:

7. The law on striking out is well versed in this jurisdiction. This application was brought on the basis of rule 9.75 of the Solomon Islands (Civil Procedure) Rules 2007. The applicant avers that the notice of appeal is frivolous, vexatious disclose no reasonable cause of action and an abuse of Court process.

8. However, rule 9.75 further provides the basis upon which the Court may exercise its powers. .

9. In determining reasonable cause of action, the Court will assess the facts and decide whether a triable case has been disclosed for the remedies and relief sought, see Earth Movers Solomon Ltd (trading as Pacific Timbers) V Samuel Thao and Others (trading as Aola Timber Exports Agency[1].

10. When a claim or appeal is received it ought to be identified whether remedy is one recognized by law. If there is no relief or a relief is not one recognized by law, then there is no cause of action.

11. If the relief is recognized by law, the question to ask, are there facts supporting the allegation in the statement of case. Are there facts supports or give rise to relief sought if not there is no cause of action. The defects can only be cured by amendment in the case where pleadings are badly drafted and the facts are not clearly stated. In such situation there is no cause of action, see Chow V Attorney General[2]

[1] (1999) SBHC 140; HC-CC 197 of 1999 (18 October 1999).
[2] (2000) SBHC 31; HC-CC 127 of 2000 (8 August 2000).

12. A frivolous or vexatious claim is where a claim, even known to the law is factually weak, worthless and futile; pleading can be described as frivolous. Frivolous claim is claim which has no merit while vexatious claim is one that is made for the purpose of harassing or injuring another party by continuously bringing a claim against that person, see Goldsmith V Sperrings Ltd[3].

13. In the above case, Lord Denning define abuse of process as;

> *"In a civilized society, legal process is a machinery for keeping and doing justice. It can be abused when it is diverted from its true course to serve extortion or oppression; or to exert pressure to achieve an improper end".*

14. Sometimes abuse can be shown by evidence that legal process is used for improper purpose. Legal process may appear proper and correct, what makes it wrong is the purpose for which it is used.

15. In this jurisdiction, in respect to case law, the starting point is the case Tikani V Motui[4], where Palmer J, as he was then, stated; 'the jurisdiction of the Court, in such is to be sparingly used only in exceptional case[5]. It should exercise where the claim is devoid of all merit or cannot possibly succeed'[6].

16. Actually the test was propounded by Lush J in the case of Norman V Mathews, it stated[7], it stated,

> *"In order to bring a case within the description it is not sufficient merely to say that the Plaintiff has no cause of action is one which on the fact of it is clearly one which no reasonable as bona fide, and content that has had a grievance which he was entitled to bring before the Court".*

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[3] (1977) 1 WLR 478.
[4] (2002) SBHC 10: HC-CC 29 of 2001 (18 March 2002).
[5] Lawrence V Lord Norrys (1980) 5 App. Cas. 210 at 219 per Lord Herschell.
[6] Wills V Earl Beauchamp (1886) 11 P.D.59.
[7] (1916) 85 L.J KB, 859.

17. Palmer CJ summed it up in the case of Fera V Ologa by stating;

> *"The pleading should be struck out in plain and obvious case; the powers of the Court to strike out should be exercised only where the case is beyond doubt and that it is satisfied that there is no reasonable cause of action. If the statement of claim discloses some cause of action, or raise some question fit to be decided by the Court, the mere fact it is weak and not likely to succeed, is no ground for striking out[8]. But even if the pleading should be struck out as disclosing no reasonable cause of action, where the Court is satisfied some material averment has been omitted, it will not dismiss the action but give leave to the Plaintiff to amend. On the other hand, if the Court is satisfied that no amendment will cure the defect it will dismiss the action[9].*

18. This cause of action centered on the failure by the Appellant to submit its tax returns for the years 2009 to 2017, 8 years.

19. It is a requirement pursuant to S.3 of the income Tax Act that income by a person for that year must be charged with tax, wether that person is a resident or non-resident.

20. The items to be taxed include gains or profits from business for the period, employment or services rendered, any right to grant other person for possession or used of property, dividends, interest or discounts, pension, or charged or discounts, amount received for alimony, allowance by Court order, a deed or child maintenance etc.

21. It is not disputed that the Appellant had failed to file with the Commissioner of Income tax, its tax return for the years 2009 to 2017. In fact, it did not comply with S.3 as read in conjunct with S.57 of the Income Tax Act.

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[8] Davey V Bantinck, Maore V Lawsen.

[9] Rep. of Feru V Peru vian Co; Goodson V Grierson, Woods V Lyttleton.

22. Due to that failure, the Commissioner's Advisor issued a default assessment against the Appellant for the years 2012 to 2017, on 11th June 2019, pursuant to S.71 (3) of the Act.

23. On 17th June 2019, by proviso 77 of the Act, the Appellant lodged an objection against the default assessments for each assessed years, and served on the Respondent after completing Form 1 of the eight schedule to the Act.

24. By notice dated 25th July 2019, issued under S. 78(3) of the Act, the Appellant was informed that its objections were disallowed. And that gives right of appeal under S.79 of the Act.

25. The major issue is whether the Commissioner had conducted a thorough investigation on the Tax Returns and financial statements provided by the Appellant after which it declare to allow the objections.

26. Before I deal with each ground I noted that the Appellant has not filed any sworn statement as yet, even in support of its appeal.

Ground 1:

27. This ground appears to create two issues linking, one after the other. It points to the fact that the Respondent had failed to issue notice after refusal to amend the assessment pursuant to S. 78(3) (b). However, it had been issued, but was issued by a wrong person apart from the Commissioner which is mentioned by the provision.

28. The Counsel for the Respondent (Crown) argues they have complied with S.78 (3). That the Advisor who endorsed the notice was an officer of the Respondent at all material times.

29. I noted the Commissioner had given notice to the Appellant on 25th July 2019 that the Appellant's objections to the default assessments were disallowed, hence, the default assessments by the Commissioner was still valid. With that, it would be absurd to

conceal the reality that the Commissioner had not done what is required of him in accordance to law.

30. I have read S. 107 (2) of the Act which specifically states that the Commissioner may authorize any Office to exercise the powers conferred upon him by the Act. Again by S.111(2) states notices given by the Commissioner under this Act may be signed by any Officer authorized by him on his behalf, and by subsection (3) every form, notice or other documents issued, served by the Commissioner is sufficiently authentic if the name of the titles of the Commissioner or of the Office authorized on behalf, is printed, stamped or written thereon. Noted as well the Officer Mr. Rajat was appointed as Finance Investigator on 12th July 2017 and was posted at Inland Revenue Division. Therefore I accept he is qualified to be authorized by the Commissioner to issue notice to the Appellant.

31. The Law in the Statute as it read is concisely clear. The Advisor who issued and signed the notice under S. 78 (3) is qualified as an agent who was authorized to do on behalf of the Commissioner. Therefore, the document becomes authentic which he signed and issued. The allegation being mistaken or that the notice was signed by an unauthorized person is not being proved. I must therefore strike out this ground of appeal.

Ground 2 and 3:

32. The second and the third grounds alleged that the Respondent failed to consider properly the Appellant's objections as it failed to consider allowable deductions. What did he take into account that should not been taken into account and what did he omit that should have taken into account.

33. The Counsel for the State argues by submitting that the Respondent had carefully considered the tax returns and financial statements supplied with the objection and decline to allow the objections because the financial statements were incorrect, contained unlawful responses and illegitimate ones.

34. A fine example which raise concern was a building costing $6million dollars. When queried the Appellants Accountant said the cost was based on his observations. In fact, there were number of buildings constructed by the tenant after entering into the lease. The lease was entered into in 2003. Any building existed at that time should have been subjected to wear and tear from 2003 and from 2009. But the Accountant stated that source documents and general leger should shed a better light on the financial statements.

35. Further the Commissioner also noted that the purchase (cost of goods sold) from 2009 to 2017 were higher than the actual sales for the motel operation. In some years these were almost double. An example is in 2012 the income from motel operation was $1,186, 304.00 and the cost of goods sold was $2,807,722.00.

36. The overall analysis indicated that the financial statements were incorrect. Yet the Appellant's Accountant stated that records and working paper would determine the final outcome.

37. I have read paragraphs 51 to 70 of the sworn statement of Mr. Rajat filed on 30th January 2020, that the Respondent had conducted thorough investigations on the tax returns and financial statements provided by the Appellant.

38. The reasons for disallowing the objections as given by the commissioner is because, he was unable to substantiate the validity of the financial statements in the absence of working papers and supporting documents. Secondly there was serious doubt existed as to the correctness of the financial analysis. And thirdly, penalties do not form part of the objection process under the Income Tax Act.

39. The evidence before this Court shows the Appellant failed to comply with its obligations. In fact, misleading the Respondent that its tax returns are ready. The Accountant for the Appellant had post phoned twelve (12) times which he promised to file tax returns. Two of those times he said he was sick. Until 26th June 2019 the Mr Rajat wrote to the Appellant's accountant and pointed out the unnecessary delays and his ongoing non-cooperation. The Accountant was then advised that the objection would be disallowed.

40. In any event, there is evidence that the Respondent had done his part in considering Tax Returns and financial statements as provided.

41. Therefore these grounds lack particulars in that the Respondent failed to provide details of which lawful and allowable deductions were not considered. In fact the Respondent had done it all. I must therefore strike out grounds 2 and 3 accordingly.

Grounds 4:

42. Ground 4 alleges that no sufficient time was given to prepare the Tax Returns. Whether or not sufficient time is given is an issue to be addressed at trial, if there is any.

43. The Counsel for the Respondent submits that the Respondent commenced investigation into the tax affairs for the Appellant since January 2019 and had been requesting the Appellant to file Tax Returns for years without success.

44. According to the sworn statement of Mr. Rajat on 15th January 2019, he sent a request to Mr. Valenti for discussion in respect of the Appellant's tax affairs.

45. Mr. Ma'ahanoa the company's Account made a reply on 27th February 2019, and said he had prepared the income tax returns for 2009 to 2017 and had commenced preparation of 2018 income tax return.

46. At the meeting on 7th March 2019, the Commissioner's representative Mr. Rajat requested Mr. Ma'ahanoa to file tax returns. Mr. Ma'ahanoa said he would file by 28th March 2019. On 28th March 2019 Mr. Ma'ahanoa advised he was sick and sought extension of 12 weeks which was granted. On 11th March Mr. Ma'ahanoa said he would lodge returns for 2-3 years outstanding by 12th April 2019. He also confirmed returns up to 2018 could be lodged by 19th April 2019. On both occasions he failed.

47. On 1st May 2019 the tax returns for 2009 to 2011 was received. On the same date Mr. Ma'shanoa was finalizing tax returns for 2012 to 2015 and that he could lodge by 3rd May 2019. He also failed.

48. From then on Mr. Ma'ahanoa had delayed filing further tax return, though promised. After being failed nine (9) times, Mr. Ma'ahanoa, on 4th June 2019, advised that there was no other option but to issue default assessments.

49. On 11th June Mr. Ma'ahanoa stated by email that he would file the returns the next day nothing happened. That was 10th time delayed. Therefore, acting on the default by Mr. Ma'ahanoa, the Accountant for the Appellant, Mr. Rajat based on information available issued default assessment on 11th June 2019, pursuant to S.71(3) of Income Tax Act. On 19th June 2019 Mr. Ma'ahanoa provided the tax returns for 2012 to 2017, after about six (6) months delayed with many promises which he had failed to act upon.

50. At the same time Mr. Rajat issued account summons and assessment notices for relevant years and advising the appellant of its obligations.

51. The returns were examined but the Respondent was not satisfied. However, the burden of proving whether or not the default assessment was excessive vests upon the Appellant, see S. 79 (4) of the Act.

52. I find sufficient time was given to the Appellant to prepare its tax returns. Each time it was requested it failed and suggested another date which it failed as well, until the Respondent issued default assessment to the Appellant. I find this ground has no merit and it's not an issue to determine at trial whilst obvious delay can be observed from exchange of information between the Respondent and Appellant's agent. I must therefore strike out this ground accordingly.

Grounds 5 and 6:

53. In both grounds the Appellant alleges that the Court has no power to order legitimate allowable and expenditure of the Appellant be lodged with the Respondent for proper assessment.

54. I noted S.79(5) vests discretionary power upon the Court to make such other order as may be thought fit. In fact any order to be made under S.79(5) of the Act relates to final determination of the appeal. This Court is formulating a ruling in respect of the application to strike out. Hearing and determining of the appeal is yet to come into the future. In my view the two grounds are irrelevant at this stage.

55. In reality the quote envisage by the Appellant in his submission is incomplete. S.79(5) further requires, "where upon, subject to any appeal under S.80, the Commissioner shall make such adjustment as are consequent upon such determination and the Court can confirm reduce or increase or annul the assessment.

56. Having said so, the power under this provision is to be exercised by the Commissioner to request legitimate allowable and expenditures from the Appellant if Court orders for proper assessment. The order here refers to the final orders of the Court in which the Commissioner has to comply with. Any final orders are yet to be envisaging for time being.

57. In all that I say I must therefore strike out the two grounds.

Conclusion:

58. The Respondent commenced an investigation into the tax return of the Appellant in January 2019, and had been requesting Appellant to file Tax Returns for 2009 to 2018 without any success. After sometimes the Appellant filed its Tax Returns for 2009 to 2011 but the rest of the years were filed later after many promises to file but failed to act.

59. Having had no options, the Respondent used information available and issued default assessment to which the Appellant objected. The Appellant did file notice of objection with return of income.

60. The Respondent examined the returns and was not satisfied therefore sought the source documents and general ledger that were not furnished. The Appellant advised that he was still completing the general ledger, notwithstanding he had already completed the financial statements. This led to the Respondent forming the belief that the returns were incorrect, and the statements made were not true.

61. S.79(4) vested the burden of proving upon the Appellant. "The onus of proving that the assessment objected to is excessive, shall be on the person assessed". In the current case the Appellant wish to furnish new financials. This shows the Appellant lodged false and misleading statements to the Respondent at first place, and not that the assessments are excessive.

62. In concluding having strike out all the grounds of appeal I must therefore strike out the entire appeal with costs.

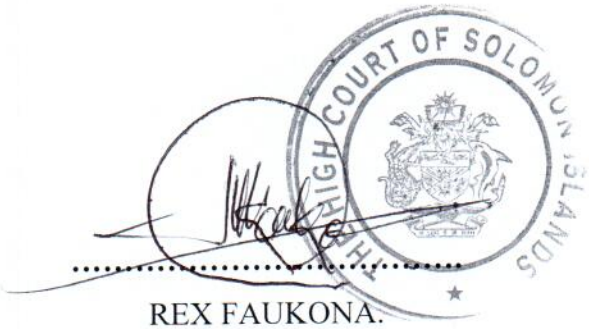
Application for leave to amending the notice of appeal:

63. Having strike out all the grounds of appeal there is nothing more left to amend. To consider any amendment cannot be done in a vacuum. At this stage it is void and is legally unnecessary to do so.

64. Nevertheless, I have the privilege to view the draft amendment. I noted ground 7 in the draft amendment carried 2½ pages. It raises many new issues which in my view do not require an amendment as it seem to form a new case altogether. In any event that will require new pleadings which will definitely defy the over ridings objectives of the rule, that is to deal with cases justly with minimum delay and expense. It means dealing with the case as soon as practicable.

65. This is 2019 case, to grant leave to amend is reversing the whole entire case back, instead of moving forward. As envisage any delay comes with expenses. Therefore, I must refuse to grant leave for the Appellant to file amendment which appear to be as new and different case.

The Court.



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DEPUTY CHIEF JUSTICE.