

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL NO. HBC 223 of 2008

BETWEEN : Bernadette Sera Filip Nicholls t/a Business Basic of Suva

PLAINTIFF

AND : Central Plumbing & Building Contractors Limited also
known as Central Plumbing & Contractors Limited of Suva

DEFENDANT

COUNSEL : Mr Hiware W with Ms Leweni of HM Lawyers for the Plaintiff
: Ms Rakai M for the Defendant instructed by Sherani & Co.

Date of Judgment : 8th January 2014

INTERLOCUTORY JUDGMENT

1. Summons dated 14th November 2012 was filed by the Plaintiff pursuant to order 20 rule 5 of the High Court Rules 1988 and sought for an order to amend the Statement of Claim filed on 16th July 2008.
2. The summons was supported by the affidavit sworn by the Plaintiff Bernadette Sera Filip Nicholls on 12th November 2012.

Sequence of Events

3. When the summons was called before Hon. Justice Amaratunga on 8th February 2013, due to the Plaintiff's non appearance summons was struck out.

4. Exparte Notice of Motion was filed by the Plaintiff on 7th March 2013 to obtain and order to reinstate the summons filed on 15th November 2012 and the Hon. Justice Amaratunga ordered to reinstate the summons and made following directions:
 - (a) The Plaintiff to serve summons for the amendment within seven days.
 - (b) The Defendant to file and serve the affidavit in opposition within 21 days.
 - (c) The Plaintiff to file reply within seven days.
5. The affidavit in opposition was filed by the Defendant on 22nd April 2013 and the matter was called before me on 19th August 2013 and the Plaintiff failed to appear before the court and the matter was struck out.
6. Notice of Motion was filed by the Plaintiff supported by the affidavit deposed by Koro Vuli Murutamana Tuitubou litigation clerk on 8th October 2013 and the said application was taken up for hearing on 22nd October 2013. The Defendant consented to reinstate the matter subject to payment of costs of \$150.00 and the matter was reinstated to the cause list, the hearing on the summons dated 15th November 2012 was taken up on 11th December 2013.
7. Order 20 Rule 5(1), 5(2) and 5(3) of the High Court Rules 1988 states:

“5(1) Subject to Order 15 rules 6, 8 and 9 and the following provisions of the rule, the court may at any stage of the proceedings allow the Plaintiff to amend his cost, or any party to amend his pleadings on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct”.

(2)Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4), or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may

nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3)An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.”

8. The amendments sought by the Plaintiff under paragraph (7), (8) and (9) gives reference to the clauses in the Agreement dated 8th May 2008 annexed to the Plaintiff’s affidavit dated 23rd June 2008 marked as ‘A’. In my view bringing in these amendments to the Statement of Claim will not cause any prejudice to the Defendant except for the delay caused which could be compensated by way of costs. I cite the statement made by Tikaram J.A. in the case of **Sujendra Sundar & Another V Chaudrika Prasad [1997]** ABU 22/97 (HBC 233/93) (unreported decided on 10th November 1997).

“The test to be applied is whether the amendment is necessary in order to determine the real controversy between the parties and does not result in injustice to the other parties. If the test is met, leave to amend may be given even at a very late stage of the trial..... when leave to amend is granted the party seeking the amendment must bear the costs of the party wasted; as a result of it.”

The said test was followed in **NBF Asset Management Bank v Taveuni Estates Limited, Registrar of Titles and Attorney General [2007]** HBC 543/04S (unreported decided on 27th March 2007).

In this matter the issues raised by the Plaintiff are relevant for the case and those issues were not brought in by way of new material. The clauses A(1), (i)(ii)

and (iii) of the Agreement were within the knowledge of the Defendant. By the amendment the particulars of the breaches had been amended and I conclude there is no prejudice cause to the Defendant by the proposed amendments by insertion of paragraphs 7, 8 and 9.

9. The Plaintiff also seek leave to amend by inserting paragraph 13 (Statement of Claim paragraph (10) which states:

Particulars of Passing Off

- (i) *Vendor is yet to transfer all communicating equipment to the Purchaser clause B(iv) of the agreement.*
- (ii) *Defendant is still placing and has placed advertisements in the dailies misrepresenting himself as owning Central Plumbing in particular using the name and the contact members of the business in the advertisements.”*

By the proposed amendment the Plaintiff refers to the particular clause of the agreement detailing more particulars. As such I conclude this amendment does not cause prejudice to the Defendant. The Defendant’s counsel stated in her submissions that this particular amendment was not marked. However I conclude it is not a material defect by not marking to disallow the amendment.

10. The Plaintiff also proposed to amend the prayer to insert the following reliefs in the prayer after deleting certain reliefs claimed in the Statement of Claim.

To delete paragraph (a)

i.e. (a) Damages for Agreement breach to replace the following paragraph as paragraph (a).

“(a)The Defendant to refund/repay the \$85,000.00 (Eighty Five Thousand) to the Plaintiff.”

I conclude this amendment is not necessary and the Plaintiff could raise this as an issue at the proper trial. As such the proposed amendment is refused.

11. The suggested amendments stated in the prayer of amended Statement of Claims are as follows:

(b) Loss of Revenue (amended Statement of Claim).

(c) Loss of Goodwill (amended Statement of Claim).

(d) Damages for Agreement breaches.

(e) Costs on a full solicitor/client basis (not an amendment as stated in it's Statement of Claim).

(f) Interest on the sum outstanding at the rate of 12% per annum from the date of filing writ to the date of Judgment.

(g) Such further and other accounts, relief, inquiries, direction, declarations, as this Honourable Court deems just.

12. The above amendments to the prayer under para (b), (c) and (d) need not be considered under separate headings. The claim is based on the agreement and liability had to be established with regard to breaches of the agreement which is covered under paragraph: (a) and (b) of the Statement of Claim. As such I refuse leave to amend by inserting new paragraphs (b), (c) and (d).

13. I further conclude that there is prejudice caused to the Defendant by delaying the proposed amendments and the leave granted to amend the Statement of Claim as concluded is on payment of costs to the Defendant.

Accordingly I make the following orders:

- (a) Leave granted for the amendments proposed in paragraph 7, 8 and 9.
- (b) Leave granted for amendments proposed to paragraph 13 of the amended Statement of Claim.
- (c) Leave is refused to amend and insertion to the prayer of the Statement of Claim.
- (d) The Plaintiff is ordered to file and serve the amended Statement of Claim within 14 days of this order and the Defendant is ordered to file the amended Statement of Defence within twenty one days of the serving of the amended Statement of Claim.
- (e) The Plaintiff is ordered to pay summarily assessed costs of \$1,500.00 to the Plaintiff within 14 days prior to filing and serving of the amended Statement of Claim.
- (f) The Plaintiff is further ordered to take all pre trial steps within four months from the date of filing of the amended Statement of Defence.



Chandrasiri Kotigalage
JUDGE