

IN THE HIGH COURT OF THE REPUBLIC OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 68 OF 2012

BETWEEN : **AUSFURN FIJI LIMITED** a duly incorporated limited liability company having its registered office at Nadi.

PLAINTIFF

AND : **DIRECTOR OF LANDS,** Government Buildings, Suva
1ST DEFENDANT

AND : **ATTORNEY GENERAL,** Attorney general's Chambers, Suva
2ND DEFENDANT

AND : **MATRIX ENVIRONMENTAL SOLUTIONS LIMITED** a duly incorporated limited liability company having its registered office at Nadi
3RD DEFENDANT

AND : **PETER MICHAEL MCGAHAN** a Company Director of Nadi.
4TH DEFENDANT

Before: A/Master M H Mohamed Ajmeer

Counsels:

Ms D Barbra for the plaintiff

Mrs M Lee for the 1st & 2nd defendants

Ms Mareta Matane for the 3rd & 4th defendants

Date of Hearing : 8 May 2014

Date of Ruling : 11 June 20 14

INTERLOCUTORY RULING

- [1] This interlocutory ruling concerns to an application filed by **AUSFURN FIJI LIMITED**, plaintiff seeking leave to amend its inter parte notice of motion dated 29 March 2012 and filed on 10 April 2012.
- [2] By notice of motion dated 1 August 2013 and filed on 7 August 2013 (“the application for amendment”) the plaintiff sought the following orders:
1. *An order that leave be granted to the Plaintiff to amend its Inter-Parte Summons dated the 29th day of March 2012 and filed in the proceedings herein on the 10th day of April 2012.*
 2. *An order that costs of this application be costs in the cause.*
- [3] The application is supported by two affidavits of Rakesh Kumar one was sworn on 1 August 2013 and filed on 7 August 2013 and the other on 6 February 2014 and filed on 7 February 2014. (“the supporting affidavits”). The supporting affidavits annexes documents marked a “RK-1”- “RK- RK2”
- [4] This application is made pursuant to Order 20, rule 5 of the High Court Rules 1988 (“the HCR”) and the inherent jurisdiction of the Court.
- [4] Only the Third and Fourth defendants oppose the plaintiff’s application for amendment and they filed affidavit in response on 4 October 2013.
- [5] The First and the Second defendants did not file any affidavit in opposition to the plaintiff’s application to amend.

Background

- [6] In April 2012 the plaintiff brought these proceedings against the defendants seeking certain declarations regarding a property being the subject of this action. At the same time the plaintiff also filed an inter-

parte summons seeking certain injunctive relief against the defendants. At injunction hearing, the solicitors for the third and fourth defendants informed the court that there is a mortgage already registered on the subject property. The court directed the fourth defendant to file a supplemental affidavit. On 6 May 2013 the fourth defendant filed a supplemental affidavit with the registered mortgage attached. As a result of this, on 7 August 2013 the plaintiff filed the application to amend the inter-parte summons.

Initial inter-parte summons

[7] Initial inter-parte summons sought relief in the nature of injunction against the third and fourth defendants in the following manner:

1. *An injunction restraining the 4th defendant whether by himself or by his servants and or agents or by whosoever from selling, mortgaging, charging, encumbering or otherwise dealing with Crown Lease No. 18820 known as "Nakoke (pt of) Nabuyagiyagi (pt of) in Ba Province in Nadi District having the area of 7985 square meters being Lot 1 SO 5736 or any part hereof howsoever until further orders of the High Court.*
2. *An injunction restraining the third and or the fourth defendant either by themselves and or by their servants and or agents or by whosoever from selling, charging, removing, disposing or in any manner howsoever dealing with any of the improvements on the Crown Lease No. 18820 including the Plaintiffs building and building materials and the Plaintiff's machinery, furniture, fixtures and fittings or any other asset of the Plaintiff that were in the property when the same were leased to the 3rd defendant under the leasing agreement entered between the Plaintiff and the 3rd defendant until further orders of the High Court.*
3. *An order that the 3rd defendant forthwith and no later than seven days from the date of the service of this order herein pay the sum of Thirty Two Thousand Dollars (\$32,000.00) plus VAT being the monthly rental for the months of August 2011 until the 31st day of March 2012 for leasing of all that land comprised in all that part of land known as Lot 1 on SO 5736 containing an area of 7985 square meters together with improvements thereon from the Plaintiff under the memorandum of lease agreement entered into between the said parties on or about the 15th day of December 2012.*
4. *An order that until further order of the Court the 3rd defendant pay to the plaintiff the sum of four thousand dollars (\$4,000.00) plus VAT being rental payable to the Plaintiff under the said lease agreement commencing from*

the 1st day of April 2012 and the date that it is in possession of the said property.

5. *An order that the defendant pay the costs of this application.”*

The Proposed Amendment

[8] The plaintiff in the supporting affidavit annexed a copy of the amended inter-parte summons (“RK2”). The plaintiff seeks to amend the initial inter-parte summons in the following manner:

1. An injunction restraining the Fourth defendant whether by himself or by his servants and or agents or by whosoever from **further** selling, mortgaging, charging, encumbering or otherwise dealing with Crown Lease No. 18820 known as “Nakoke” (pt. of) Nabuyagiyagi (pt. of) in Ba Province in the Nadi District having an area of 7985 square meters being Lot 1 SO 5736 or any part thereof howsoever until further orders of the High Court.
2. An injunction restraining the Third and or the Fourth Defendant either by themselves and or by their servants and or agents or by whosoever from **further** selling, charging, removing, disposing or in any manner whatsoever dealing with any of the improvements on the Crown lease No. 18820 including the Plaintiff’s building and building materials and the Plaintiff’s machinery, furniture, fixtures and fittings or any other asset of the Plaintiff that were in the property when the same were leased to the Third Defendant under the leasing agreement entered between the Plaintiff and the Third Defendant until further orders of the High Court.
3. An order that the defendant pay the costs of this application herein.

[9] In short, the plaintiff seeks to remove paragraphs 3 and 4 from the original application and include the word “**further**” in paragraphs 1 and 2 immediately before the word “selling”.

The plaintiff’s submission

[10] It was submitted on behalf of the plaintiff that the insertion of the word “further” in paragraphs 1 and 2 would operate to restrain the

third and fourth defendants anymore dealings on the subject property. The addition of the word “further” in paragraphs 1 and 2 inter-partes summons, it was submitted, would take into consideration that the mortgage was obtained after the plaintiff had sought injunction relief against the third and fourth defendants. The plaintiff’s counsel further submitted that the third and fourth defendants have not raised any reasons why the amendment should not be allowed therefore the court ought to grant orders in terms of the application for amendment.

The 3rd & 4th defendants’ submission

[11] On behalf of the third and fourth defendants Ms Mareta submitted that any orders for injunction would affect their right as the lawful registered lessor of the subject property and will also impact ANZ Bank’s mortgage security. She also submitted that the proposed amendment does not bring about any new issue to be decided and it effectively is a second attempt to re-litigate the same issues before the court.

The Law on amendment

[11] The plaintiff relies on Order 20 Rule 5 of the HCR which states that:

“subject to Order 15, rules 6, 8 and 9 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.”

[12] The **Supreme Court Rules 1999 (White Book)** page 377 states as follows (20/08/01):

“Effect of Rules 5 to 8 (rr.5, 7 and 8) – These rules should be read together as conferring upon the Court a general power to allow or order amendments to be made. Rule 5 deals more particularly with the power of the Court to allow the writ or any pleading to be amended; and r.8 deals more generally with the power of the power of the Court to order any document (other than a judgment or order, see para (2)) to be amended. There is no difference in substance between the Court giving leave to amend under rr.5 and 7, and the Court making an order that an amendment be made under r.8.”

Determination

- [12] First of all I must say this. The plaintiff makes this application seeking leave to amend the inter-parte notice of motion which seeks certain injunctive relief against the defendants. I will only deal in these proceedings with the plaintiff's application to amend. In doing so, I will not deal with the substantive application for injunction. That will be heard and decided by the judge.
- [13] The plaintiff applies to seek leave of the court to amend the inter-parte notice of motion, wherein it seeks certain injunctive orders against the third and the fourth defendants (hereinafter may be sometimes referred to as "the defendants"). Basically, the plaintiff sought injunctive orders to prevent the defendants from selling, mortgaging, charging, encumbering or otherwise dealing with the subject matter and from selling, charging, removing, disposing or in any manner howsoever dealing with any of the improvements on the subject matter, see para 1 and 2 of the original summons.
- [14] The plaintiff's application seeks to remove paras 3 and 4 from the original application and to include "further" in paras 1 and 2 immediately before the word "selling".
- [15] The defendants oppose to make amendment as proposed by the plaintiff, saying that the proposed amendment does not bring about any new issue to be decided and the plaintiff is attempting to re-litigate the same issue before the court.
- [16] The plaintiff's inter-parte summons (original) was partly heard by Justice Tuilevuka on 2 May 2013. On that day during arguments it was revealed that the fourth defendant had encumbered the subject property by taking out a mortgage. Then the court directed the parties to file supplemental affidavit regarding the registration of the mortgage. The court also indicated that if the mortgage had been registered, then the court was not in a position to grant injunction as prayed in prayers 1 and 2 of the summons. It is in these backgrounds the application seeking leave to amend the summons bloomed.

[17] The plaintiff filed its writ and inter-parte notice of summons on 10 April 2012. The hearing of the summons was heard on 2 May 2013. At hearing, the fourth defendant disclosed that a mortgage had been registered affecting the subject matter. The mortgage had been registered on 27 November 2012. Obviously, the mortgage had been registered after the plaintiff filed its writ and the inter-parte summons on 10 April 2012. The necessity to amend the summons has arisen only after the fourth defendant revealed the fact that a mortgage had been registered. Until then the plaintiff was unaware of it. The plaintiff filed its current application to amend on 7 August 2013.

[18] The Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just, see Ord. 20, r.5 of the HCR. It is to be noted that the court has discretion to allow a party to amend his pleading for the purpose of determining the real question in controversy between the parties to any proceedings.

[20] In **Stephens v Nunnink** [2005] FJHC 515; HBC0204/2004S (7 September 2005), His Lordship Pathik, J set out the principles relating to grant to leave to amend as follows:

“The general principles for grant of leave to amend [appear] in the Supreme Court Practice 1988 where under Or. 20/05....it is stated that:

*It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defence or error in any **proceedings: RL BAKER Ltd -v- Medway Building & Supplies Ltd** [1958] 1 WLR 1216, at 1231, per Jenkins LJ ...”*

[21] In **Easton v Ford Motor Co Ltd** [1993] 4 All ER 257 the Court of Appeal (Civil Division) held that:

“In the ordinary course of litigation an amendment to pleadings ought to be allowed for the purpose of determining the issues

between the parties if no injustice was caused to a party by the amendment...” (Added emphasis).

[22] The defendants advanced argument that the proposed amendment does not bring about any new issue to be decided and the plaintiff is attempting to re-litigate the same issue before the court. I am unable to agree with the defendants’ counsel on this point, for pursuant to Ord.20, r. 5 (5) of the HCR an amendment may be allowed under paragraph (2)(application for leave to make amendment mentioned in paragraphs (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of writ has expired) notwithstanding that effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially same facts as cause of action in respect which relief has already been claimed in the action by the party applying for leave to make the amendment. In my opinion the phrase **“if the new cause of action arises out of the same facts”** mentioned in Ord. 20, r.5 (5) does not necessarily mean **“only if the new cause of action arises out of the same facts”**. The court may allow amendment whether or not the amendment sought brings about a new issue if the court thinks it just to do so.

[23] Is there any delay in making the application for amendment? Even if there were delay, that can be compensated by cost. The mortgage has registered after the plaintiff filed its writ. It was only revealed by the fourth defendant during the hearing of the motion on 2 May 2013. The application to amend the summons was made on 7 August 2013, about three months after the plaintiff became aware of the mortgage. In my judgment three months delay in making the application for amendment cannot be considered a culpable delay. The defendants will not be prejudiced by that.

[24] I will now turn to the issue of prejudice or injustice. The defendants did not complain that they will be prejudiced or injustice will be caused to them, if the amendment is allowed. The defendants state that any orders for injunction would affect their right as the lawful

registered lessor of the subject property and will also impact ANZ Bank's mortgage security. In these proceedings I am not going to decide whether injunction is to be granted or not. My concern is that whether the amendment sought will be allowed or not. The argument advanced by the defendants that any orders for injunction will affect their rights as registered lessor of the property and will also impact ANZ Bank's mortgage security may be relevant to the substantive application for injunction. That argument is not relevant to the current proceedings.

Conclusion

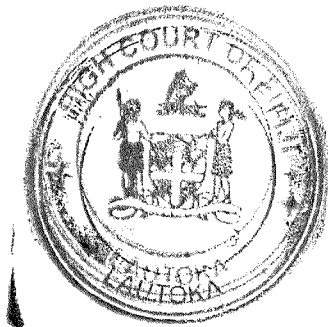
[25] The amendment to the plaintiff's inter-parte notice of motion is necessitated by the defendants' action in that they had registered a mortgage while the plaintiff application for injunction was still pending in court. In my judgment the amendment sought by the plaintiff is necessary for the purpose of determining the real issue in controversy between the parties. The defendants will not be prejudiced, if not no injustice will be caused to the defendants, if the court allowed the plaintiff to make amendment to its summons. The matter was thoroughly argued before me and I am wholly persuaded that an order granting leave for the plaintiff to make amendment to its inter-parte notice of motion filed on 10 April 2012 is the right order to make.

[26] In all the circumstances I will make order that the cost of these proceeding shall be cost in the cause.

Final Orders

- i. Leave is granted for the plaintiff to amend its inter-parte summons filed on 10 April 2012 as per the proposed amendment filed herein;
- ii. Costs shall be in the cause;
- iii. The matter is now adjourned to Deputy Registrar for allocation before a judge;

iv. Orders accordingly.



At Lautoka

11 June 2014

M H Mohamed Ajmeer

M H Mohamed Ajmeer
A/Master of the High Court

Solicitors:

Messrs Rams Law, Barristers & Solicitors for the plaintiff

Messrs Mitchell Keil Lawyers for the 3rd & 4th defendants