

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.HBC 43 of 2014

BETWEEN : **EXTREME BUSINESS SOLUTION (FIJI) LIMITED** of 34 Knolly Street,
Suva

PLAINTIFF

AND : **FIJI NATIONAL UNIVERSITY**, a university established and incorporated
under the Fiji National Decree 2009

DEFENDANT

BEFORE : Master Thushara Rajasinghe

COUNSEL : Mr. D Sharma. with Choo N. for the Plaintiff
Mr. Kapadia V with Singh R. for the Defendant

Date of Hearing : 15th September, 2014

Date of Ruling : 14th November, 2014

RULING

A. INTRODUCTION

1. This is a Summons filed by the Plaintiff pursuant to Order 20 rule 5 of the High Court Rules seeking following orders inter alia;
 - i. *That leave be granted to the Plaintiff to file and serve an amended statement of claim within 7 days.*

- ii. *That the Defendant be given 14 days to file and serve statement of defence to the amended statement of claim and counterclaim,*
- iii. *That the Plaintiff be given 14 days thereafter to file and serve Reply to Amended statement of defence and statement of defence to counterclaim.*

2. This Summons is supported by an affidavit of Yogendra Sharma, the director of the Plaintiff. Mr. Sharma deposed in his affidavit that the Plaintiff intends to amend the special damages which was not included in the statement of claim and other pertinent facts that were left out which he claimed as crucial in establishing the Plaintiff's claim against the Defendant.
3. Upon being served with this Summons, the Defendant filed an affidavit of Brian Singh in opposition to this application. Mr. Singh in his affidavit deposed that the three causes of actions that the Plaintiff is trying to introduce through this amendment are frivolous, vexatious and does not disclose a reasonable cause of action based on the agreements reached between the parties. He pointed out that these three causes of actions will lead in future that the Defendant is making an application to strike out the Plaintiff's claim pursuant to Order 18 r 18. Having deposed the factual background of the dispute between the parties over these two agreements for supply of refurbished computers, Mr. Singh pleaded that this proposed amended statement of claim be disallowed.
4. Mr. Sharma in his reply affidavit reiterated that these proposed amendments are connected to the main dispute between the parties and provided a detailed background of their version of the dispute.
5. Subsequent to the filing of respective affidavits of the parties, this Summons was set down for hearing on 15th of September 2014. The counsel for the Plaintiff and the Defendant made their respective oral arguments and submissions during the course of the hearing. The learned counsel for the Defendant tendered his written submissions at the conclusion of his oral submissions. Having carefully considered the respective affidavits, oral arguments and submissions, I now proceed to pronounce my ruling as follows.

B. THE LAW.

6. Order 20 rules 5 (1) of the High Court Rules has given the court a discretionary power to allow the Plaintiff or any other party to the proceedings to amend their pleadings at any stage of proceedings on such terms as to cost or otherwise as may be just and in such manner as it may direct. Order 20 rules 5 (1) 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".

7. Lord Keith of Kinkel in Ketteman and others v Hansel Properties Ltd (1988) 1 All ER 38 has discussed the principles of amendment of pleading in an inclusive manner, where his lordship has observed that

"Whether or not a proposed amendment should be allowed is a matter within the discretion of the judge dealing with the application, but the discretion is one that falls to be exercised in accordance with well-settled principles. In his interlocutory judgment of 10 December 1982, allowing the proposed amendment, Judge Hayman set out and quoted at some length from the classical authorities on this topic. The rule is that amendment should be allowed if necessary to enable the true issues in controversy between the parties to be resolved, and if allowance would not result in injustice to the other party not capable of being compensated by an award of costs. In Clarapade & Co v Commercial Union (1883) 32 WR 262 a 263 Brett MR said;

The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by cost; but if the amendment will put them into such a position that they must be injured it ought not to be made".

8. Having discussed the principles of amendment of pleadings, Lord Keith further elaborated the test of injury to the other side, where his lordship found that;

“the sort of injury which is here in contemplation is something which places the other party in a worse position from the point of view of presentation of his case that he would have been in if his opponent had pleaded the subject matter of the proposed amendment at proper time. If he would suffer no prejudice from the point of view, then an award of cost is sufficient to prevent him from suffering injury and the amendment should be allowed. It is not a relevant type of prejudice that allowance of the amendment will or may deprive him of a success which he would achieve if the amendment were not to be allowed”.

9. In Reddy Construction Company Ltd v Pacific Gas Company Ltd (1980) FJCA 9; (1980) 26 FLR 121(27 June 1980), the Fiji Court of Appeal has discussed the legal principles of amendment of pleadings, where the Fiji Court of Appeal observed that;

“the primary rule is that leave may be granted at any time to amend on terms if it can be done without injustice to the other side. The general practice to be gleaned from reported cases is to allow an amendment so that the real issue may be tried, no matter that the initial steps may have failed to delineate matters. Litigation should not only be conclusive once commenced, but it should deal with the whole contest between the parties, even if it takes some time and some amendment for the crux of the matter to be distilled. The proviso, however that amendment will not be allowed which will work an injustice is also always looked at with care. So in many reported cases we see refusal to amend at a late stage particularly where a defence has been developed and it would be unfair to allow a ground to be changed”.

10. Justice Pathik in Fiji Electrical Authority v Suva City Council (1994) FJHC2; Hbc0901d.84s (5 August 1994) in determining an application made under order 20 r 7 for amendment of other documents, which is also founded on the same legal principles as of this application, held that

"the guiding principle of cardinal importance, namely, that all such amendment ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings".

11. It appears from the above discussed judicial precedents, that the judicial approach in exercising its discretionary power on the issue of amendment of pleadings is founded on a wider liberal approach in facilitating the parties to bring the real issues in controversy. It is the onus of the party, who seeks an amendment, to satisfy the court that the proposed amendment is within the actual controversy between the parties and essential to the determination of it. As Lord Keith held in Ketteman and others v Hansel Properties Ltd (supra) the test of injustice to the other party is that to consider whether they are in a worse position in respect of presenting their case than they would have been in if their opponent had pleaded the proposed amendment at the proper time.
12. I now turn my attention to consider the legal principles pertaining to the objection raised by the Defendant. The Defendant's objection for this application is founded on the ground that these proposed amendments are frivolous, vexatious and disclose no reasonable cause of action based on the agreements reached between the parties. Having raised this objection, the learned counsel of the Defendant submitted that these proposed amendments have been brought in *mala fide* and will not assist to resolve the real controversy between the parties.
13. The issue of *mala fide* is one of the factors which could cause injuries to the other party in an application of this nature. Jenkins L.J. in G.L. Baker Ltd v Medway Building and Supplies Ltd (1958) 3 All ER 540 while referring Bramwell LJ in Tildesley v Harper (1878), 10 ChD 393 observed that;

"Bramwell LJ said in the third line of his Judgment "I have had much to do in chambers with application for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide,

or that, by his blunder, he had done some injury to his opponent which could not be compensated for by cost or otherwise".

14. The learned counsel for the Defendant contended in his submissions that the nature of these proposed amendment will lead in future that the Defendant is making an application to strike out the amended statement claim pursuant to Order 18 rule 18, wherefore, this application should be dismissed. I do not concur with the learned counsel's contention at this stage of the proceedings. The test of determining the frivolous and vexatious nature of the proposed amendments and the issue of discloses no reasonable cause of action in an application of this nature is distinct from the test as applied in an application made pursuant to Order 18 r 18. The court is allowed to consider whether the proposed amendments are frivolous, vexatious and discloses no reasonable cause of action in order to determine whether the proposed amendments are essentially connected to the actual dispute between the parties or the Plaintiff is acting mala fide.

C. ANALYSIS,

15. Having carefully considered the respective affidavits and submissions of the parties and the proposed amended statement of claim, it appears that the proposed amendments contain three main components. The first is the claim for storage and handling charges of 510 personal computers in New Zealand for 87 days. The second component is the claim for rental charges for 20 months for use of 510 computers at the rate of \$20 per day. The third component is the claim for loss of business income for the years of 2012 and 2013 in the sum of \$767,427.93.
16. I now turn to the first component of the proposed amendments that is the claim for storage and handling charges of 510 computers in New Zealand for 87 days. The Plaintiff stated that the Defendant's delay in obtaining the duty concession compelled them to store the 510 computers in New Zealand and incurred expenses in the form of storage and handling charges.

17. Apparently, the Plaintiff's original claim was limited to their claim of \$ 143,499.60 which is the balance payment from the agreed amount for the 510 computers provided by them pursuant to the variation agreement. However, the Defendant in his counter claim brought up an issue of penalty charges for late delivery of computers and claimed \$ 846,000 as its counter claim. The claim of penalty charges for late delivery is not only for the computers provided pursuant to the variation agreement, but also for the computers provided in the main agreement. Accordingly, it appears that the dispute brought in the original statement of claim has now expanded to the issues of delaying of delivery of the computers in both agreements and who is responsible for such delay. Accordingly, the real dispute between the parties as the pleadings stand as now is not limited to the claim of balance payment from the agreed amount for 510 computers. It has now extended to the issues of late delivery and penalties for the late delivery. Under such circumstances, it appears that the issue of storage and handling charges is directly connected to the real dispute between the parties.
18. I am mindful of the fact that the Plaintiff is not required to prove his propose amendment at this stage. It is only required to satisfy the court that the proposed amendments are crucial to the determination of actual dispute between the parties. Under such circumstances, I find that the dispute of whether the Plaintiff is entitled for the claim of storage and handling charges of 510 computers in New Zealand is an essential component in determination of the actual dispute between the parties.
19. In respect of the third component of the proposed amendments, that is the claim of loss of income and earnings due to the nonpayment by the Defendant, the Plaintiff stated that this default of payment prevented them to proceed with other business projects. They claim that the nonpayment of the agreed full amount by the Defendant caused them adverse financial difficulties, which prevented them in financing other business projects. Meantime the loss of reputation of the Plaintiff has also adversely affected their business.
20. The Defendant objected this claim of loss of income and earnings. They contended that if this component of amendment was allowed, it would put the Defendant in a strenuous and burdensome process of discoveries and inspections of documents of the Plaintiff. The

learned counsel further submitted that the loss of business opportunities of the Plaintiff has no significant connection to this actual dispute.

21. It appears that the nonpayment of agreed full amount may have affected the financial capabilities of the Plaintiff, which may ultimately have affected their other business projects. In fact, these issues should be determined in a proper hearing. At this stage of the proceedings, it appears that the claim of loss of income and earnings in the form of special damages due to the nonpayment of agreed full amount for 510 computers forms an essential part of the actual dispute between parties, which is founded on the allegations of non-compliance and breaches of the two agreements.
22. Having concluded that the claims of storage and handling charges of the 510 computers in New Zealand and loss of income and earnings due to the nonpayment of the agreed full amount for 510 computers are essential components in determination of the actual dispute between the parties, I now draw my attention to determine whether the Defendant is in a worse position in respect of presenting their case than they would have been in if the Plaintiff had pleaded these two proposed amendments at the proper time.
23. The main objection of the Defendant is that the claims of storage and handling charges and the loss of income and earnings are frivolous, vexatious and disclose no reasonable cause of action. I do concur with the contention of the learned counsel of the Defendant that there was no contractual obligation for the Plaintiff to wait for the duty concessions. They would have proceeded in delivering the computers as per the agreed time schedule. However, the Plaintiff submitted that the Defendant had requested them to wait until the Defendant obtains the duty concession, which compelled them to store the computers in New Zealand. Apparently, these contrasting contentions of the issue of storage and handling charges are reflective enough to establish that there is a dispute between the parties on the issue, which is directly connected to the issue of delaying of delivery of the computers raised by the Defendant in their counter claim. At this point, I reiterate my findings on the third component of these amendments which I discussed in paragraph 21 above. Accordingly, it is my opinion that the Plaintiff is not acting *mala fide* in bringing

these two claims of storage and handling charges and loss of income and earnings as amendments to the statement of claim. Wherefore, it is my conclusion that the Defendant is not in a difficult position in respect of presenting their case than they would have been in if the Plaintiff had pleaded these two proposed amendments at the proper time. I further find that any difficulties sustained by the Defendant could be compensated with an appropriate cost.

24. I now turn to the second component of the proposed amendments that is the claim of rental charges for 510 computers for 20 months from 10th of July 2012 till to date. The learned counsel for the Plaintiff, himself conceded that this second component has no merits and agreed that the Plaintiff could not seek such relief, while seeking an order to recover the balance payment from the agreed amount for the computers provided by them with interest. I do not wish to discuss further on this issue and conclude that the claim of rental charges for the 510 computers for 20 months does not constitute a crucial component in determination of the actual dispute between the parties. Accordingly, I do not allow this amendment to the statement of claim.
25. Having considered the reasons set out above, I make following orders that;
- i. The Plaintiff is granted leave to amend the statement of claim to include the claims of storage and handling charges of 510 computers in New Zealand and loss of income and earnings,
 - ii. The Plaintiff is ordered to file and serve its amended statement of claim with the above mentioned amendments within 7 days of this order,
 - iii. The Defendant is awarded sum of \$2,000 as for the cost of this application, assessed summarily,

Dated at Suva this 14th day of November, 2014.



R.D.R. Thushara Rajasinghe
Master of High Court, Suva