

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 38 OF 2013**

**BETWEEN** : **BRUCE JOHN CURRIE** of 76 – 84 Park Wooloongabba  
Brisbane, QLD 4102, Australia, as Shareholder

*Plaintiff*

**AND** : **CRYSTAL CLEAR MINERAL WATER (FIJI) LIMITED** a  
limited liability Company having its registered office at Lot  
20, Waqadra Industrial Subdivision, Namaka, Nadi

*Defendant*

**Appearances:** Mr. Singh R of Patel Sharma, Barristers & Solicitors for  
the Plaintiff.

Ms. Doton B of Rams Law, Barristers & Solicitors for the  
Defendant.

## **RULING**

### **Introduction**

1. Before the Court is the plaintiff's application by motion dated 28 February 2014 seeking an order that it be given liberty to amend his Statement of Claim to join MBM Computer Supplies Pty Limited as a second plaintiff. The application is made pursuant to Order 16 rule 6(5) (b), (3) and Order 20 of the High Court Rules.
2. The application is supported by an affidavit sworn by the plaintiff on the 24<sup>th</sup> February 2014. In this affidavit in support the plaintiff states that he holds 50,000 ordinary shares in the defendant company. That he is the owner of the company MBM Computer Supplies Pty Limited

which is the company to be added as a second plaintiff. That further that he has lent money, the subject of these proceedings to the defendant company personally and through the proposed 2<sup>nd</sup> plaintiff company to the defendant company. That these proceedings is issued to recover from the defendant company the sum of \$1,210,589:00 (one million two hundred and ten thousand and five hundred and eighty nine dollars) advanced to them over a period of time. That as the payment for services were made through him and through the MBM Computer Supplies Pty Ltd and receipts issued through the said company. He therefore requests that the said company be added as the second plaintiff.

3. The application is opposed and the defendant through one of the director, a Mr. Mohammed Altaaf filed an affidavit in opposition sworn on the 15 April 2014. The affidavit in opposition states, so far as is relevant the following:-
  - (i) That he denies that the defendant owes money to the plaintiff as claimed or that the plaintiff is the sole owner of MBM Computer Supplies Pty Ltd. The plaintiff owns only 51% of the above company.
  - (ii) That the defendant denies that there were services rendered by the plaintiff to the defendant and that the defendant has failed to provide any evidence of purported receipts issued in the name of the proposed 2<sup>nd</sup> plaintiff.
  - (iii) The defendant denies that there was any dealing between the defendant company and the plaintiff or the MBM Computer Supplies Pty Ltd.

### **Determination**

4. Both Counsels provided well written submissions as ordered. The plaintiff submits that generally the courts will allow a party to amend its pleadings if the amendment will help in determining the real question in controversy between them. In this case the real controversy between them is whether there were services and or advances was provided by the plaintiff through the intended party to be joined (MBM Computer Supplies Pty Ltd) to the defendant. The plaintiff by also being the owner of the company to be joined and which provided the services or advances were made to the defendant

is entitled to bring his company as a party. This will clarify the issues to be determined by them.

5. The defendant on the other hand submits that the application is defective in that the plaintiff has not correctly pleaded the correct rules upon which the application is made. In its view there is no existing rule 6 in Order 16 of the High Court Rules and that the plaintiff has not pleaded that it is bringing the application under Order 15 rules 4 and 6. The second point submitted is that the intended 2<sup>nd</sup> plaintiff has not disclosed any right to relief from the defendant. In support of this contention the defendant denies that there was any dealing or arrangement between it and the intended 2<sup>nd</sup> plaintiff but there could be a claim by the intended 2<sup>nd</sup> plaintiff against the 1<sup>st</sup> plaintiff. The third point submitted by the defendant is that any claim against it by the intended 2<sup>nd</sup> plaintiff is statute barred and this is because the alleged monies claimed by the intended 2<sup>nd</sup> plaintiff dates back to 2003, well outside the period stipulated under section 4 of the Limitation Act.

### **The Legal Considerations in Applications for Amendment**

6. Before we consider the test necessary to determine the grant of leave to amend a writ it appears prudent to consider the effect of any amendment first. An amendment granted with or without leave takes effect from the date of the original document which it amends and not from the date on which the amendment is made. The logic is simply that an application to amend is an application to amend the original document such that when leave is granted or when an amendment is made it is to affect the original document. Therefore when an amendment is made to a writ the amendment dates back to when the writ was originally issued and the action continues as though the amendment was inserted from the beginning. The writ as amended becomes the origin of the action. From the above it follows that a plaintiff cannot amend a writ by adding a cause of action which has accrued to him/her since the issue of the original writ (see **Eshelby v. Federated European Bank Ltd (1932) 1 KB 254**). The difficulty in accepting an amendment to a writ by adding a cause of action which accrued since the issue of a writ is the likely prejudice to a defendant of a defence already available to him. In most instances a Court will not refuse an amendment simply because it introduces a new case but it will refuse where the amendment would change the action into one of a substantially different character which would conveniently be the

subject of a fresh action; (*Raleigh v. Goschen* (1898) 1 Ch.73); (see also paragraph 20/8/2, Vol. 1, White Book 1999 edition).

7. The plaintiff's application for leave to amend his writ is made under order 16 rule 6(5)(b), (3) and more importantly under Order 20 rule 5. Order 20 rule 5 states:

*5.-(1) 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.*

*(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.*

*(4) An amendment to alter the capacity in which a party sues may be allowed under paragraph (2) if the new capacity is one which that party had at the date of the commencement of the proceedings or has since acquired.*

*(5) An amendment may be allowed under paragraph (2) notwithstanding that the 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 the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.*

8. The proviso in the above rule that it is subject to Order 15 rules 6, 8 & 9 clarifies further that an action survives notwithstanding that a party was not initially joined or had been joined incorrectly. The principle that an amendment may be necessary to ensure that all the matters in dispute can properly be determined and adjudicated upon underlies these rules.
9. I am of the view that the plaintiff wrongly stated in his application that it is made under Order 16 rule 6 when in fact it ought to be made under Order 15 rule 6. They have acknowledged that that was a mistake and I accept their position and the application ought not be struck out as is submitted by the defendant on that basis. The proper determination of the issues between the parties still remains the overriding factor.
10. The test to be applied in an application to amend a writ has two clear components, the first is whether such an amendment is necessary in order to properly determine the real controversy between the parties and the second is whether such an amendment could result in injustice to the other party. In ***Peter Sujendra Sundar & Anor v. Chandrika Prasad*** (1997) ABU 22/97 his Lordship Justice Tikaram stated that ...*"if the test is met leave to amend may be given even at a very late stage of the trial...However the later the amendment the greater is the chance that it will prejudice other parties or cause significant delays, which are contrary to the public interest..."*. In ***NBF Asset Management Bank v. Taveuni Estates Limited, Registrar of Titles & Attorney General*** (2007) HBC 543/04 Master Udit stated that ...*"the underlying rationale allowing amendment is to ensure that the Court is able to resolve the whole contest between the parties. At the same time the Court must be wary of and guard against multiplicity of suits ..."*

**What is the real controversy between the parties to be determined?**

11. The writ of summons issued on the 8 March 2013 states briefly that the parties entered into an agreement for the supply of goods and services. The plaintiff who holds a 20% share in the defendant company and upon reliance on the said agreement supplied goods and services to the defendant company. The defendant company did not pay the amount alleged to be owing to the plaintiff and the plaintiff having made demands from the defendant for payment and no payment being made issued a claim against it.

12. The plaintiff who is a director of a company in Brisbane, Australia also supplied some of the goods and services through that company to the defendant. It is the inclusion of this company in Australia as the intended 2<sup>nd</sup> Plaintiff which is the subject of this application. In my view the controversy is very clear and simple and the addition of the intended plaintiff certainly clarifies the issues better.

### **The Objection to the amendment**

13. The only objection that needs attention is whether the claim is statute barred. The defendant is of the view that the claim is statute barred and relies on the application of Order 15 rule 6(5) as the basis of the objection. This rule states:-

*(5) No person shall be added or substituted as a party after the expiry of any relevant period of limitation unless either-*

*(a) the relevant period was current at the date when proceedings were commenced and it is necessary for the determination of the action that the new party should be added, or substituted, or*

*(b) the relevant period arises under the provisions of subparagraph (i) of the proviso to paragraph 4(1)(d) of the Limitation Act and the Court directs that those provisions should not apply to the action by or against the new party.*

*In this paragraph "any relevant period of limitation" means a time limit under the Limitation Act.*

14. The defendant relies on the decision of Justice Amaratunga in **Kososaya -v. Director of Lands (2013) FJHC 189** as the basis of his objection. Justice Amaratunga in the above instance followed the general rule that no party can be joined after the expiration of the limitation period.
15. **The plaintiff in reply relied on the Court of Appeal decision in Land Transport Authority -v.-Ravind Milan Lal (CA ABU 53/07)** where it was stated that although a High Court Judge had an undoubted discretion to order a joinder if special or peculiar circumstances could be made out. Further the case of *Kososaya* is

distinguishable in that the application was to add a defendant and to obtain injunctive orders against it.

16. The plaintiff further points out that this is matter is not caught out by the Limitation Act in that the agreement to provide the services was on-going and that the last service rendered was in January 2013 and the writ was issued in 2013.
17. I agree with the plaintiff's submission that the matter is not caught out by the Limitation Act given that firstly the arrangement was on-going and that the last service in January 2013 was well within the limitation period. The order relied upon in my view does not apply.
18. The most important factor is whether the amendment will clarify the dispute between the parties clearer. The addition of the 2<sup>nd</sup> plaintiff as is applied for will most certainly clarify the issues between the parties.

### Conclusion

19. For the above reasons the Court is satisfied that the issues between the parties would be made clearer with the addition of the 2<sup>nd</sup> plaintiff as sought and I therefore make the following orders:-

1. That leave is granted to amend the writ by adding a 2<sup>nd</sup> plaintiff;
2. That the plaintiff is given 14 days to amend the writ accordingly;
3. That the plaintiff is pay the cost of the application which I summarily assess at \$400:0 to be paid within 14 days; and
4. The matter to be put before the Master for further directions.



13/03/2015  
For Master H Robinson

High Court

At Lautoka

.....February 2015