

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No.: HBC 171 of 2008

BETWEEN: KARL ZOELLER and EVA ZOELLER both of 73-4194 Malino Place,  
Kailua Kona, Hawaii 96740, Entrepreneurs respectively.

PLAINTIFFS

A N D: BRUCE KENNETH BRAMHILL and JILL CHRISTINE BRAMHILL  
both of 8/18 North Road, Brighton, Victoria, Australia 3186, Investors  
respectively.

1<sup>st</sup> DEFENDANTS

A N D: PETER KNIGHT and PAUL MCDONNEL trading as CROMPTONS  
at Suite 10, QBE Arcade, Victoria Parade, Suva, Barristers & Solicitors.

2<sup>nd</sup> DEFENDANTS

Before : Master VISHWA DATT SHARMA  
Counsel : Mr. O'Driscoll for the Plaintiffs.  
: Mr. Fung for the 1<sup>st</sup> Defendants.  
: Mr. D. Sharma for the proposed Defendants.

Date of Hearing: 23<sup>rd</sup> June, 2015  
Date of Ruling: 17<sup>th</sup> November 2015

R U L I N G

INTRODUCTION

1. The Plaintiff filed this Summons For Joinder pursuant to *Order 15 Rule 6 (2) (b)(ii)* of the *High Court Rules, 1988* and sought for the following orders-

(a) To join Joachim Soecker and Taveuni Development Company Limited as the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to this action.

2. This application is based on the grounds contained in the affidavit of Karl Zoeller filed on 28<sup>th</sup> March, 2013.

### BACKGROUND FACTS

3. The Plaintiffs commenced the substantive proceedings against the First and Second Defendants in the within action on 22<sup>nd</sup> May, 2008, seeking inter alia damages based on breach of covenants of an 'intend to purchase agreement'.
4. On 23<sup>rd</sup> August, 2006, the Plaintiffs as Purchasers and the First Defendants as Vendors entered into an Agreement of Intent to Purchase and Sell whereby the Plaintiffs would purchase the property described in Certificate Of Title No. 28655 in Lot 23 on DP 7351, Waidroka in the District of Serua containing 4113 square meters from the First Defendants for the sum of US \$242,000.
5. The Agreement also specified that a home to be built to code with engineers certificates was also included in the sale.
6. It was also a requirement of the Agreement that the parties obtain ministerial consent.
7. The Purchasers were not to take possession until acceptance of title and payment of the balance owed.
8. The Plaintiffs made payments in respect of the various phases of the building works on the said House as requested by the First Defendants until 07<sup>th</sup> February, 2008, when the Plaintiff's Solicitors sent a rescission notice to the First Defendants through the Second Defendants, alleging breach of the said Agreement by the First Defendants in respect of the building works on the said House, and that the Minister's consent had not yet been obtained.
9. The First Defendants denied any breach of the said Agreement on their part.

10. After a lapse of some seven (7) years, the Plaintiffs are now seeking to join Joachim Soecker and Taveuni Development Company Limited as the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to this action respectively.
11. According to the Plaintiff, the affidavit of Karl Zoeller and the Amended Statement of Claim sets out the material facts which should lead to the conclusion that the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants should be joined as parties to this proceedings.
12. On the other hand, Counsel representing the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants is vigorously opposing this application and further stated that the Agreement was signed in 2006 and the application for joinder filed in March 2013, which is outside the 6 year Limitation period and therefore 3<sup>rd</sup> and 4<sup>th</sup> Defendants cannot be joined as parties to this proceeding.
13. It is also pertinent to bear in mind that on a Notice of Motion dated 05<sup>th</sup> August, 2010, this court delivered a Judgment on 18<sup>th</sup> Day of January, 2013, making a finding that the " Agreement" entered upon between the parties herein on 23<sup>rd</sup> August, 2006, was "Void ab initio".

## THE LAW

### *Misjoinder and non-joinder of parties (O.15, r.6)*

14. Order 15 Rule 6 empowers the court to make an order for addition of a party. The said provision states as follows:-

*"no cause or matter shall be defeated by reason of the mis joinder or non-joinder of any party; and the court may determine the issues or question in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter" the aforesaid under order 15 rule 2, a court is vested with the wide discretion at any stage of the proceedings "as it thinks just and either of its own motion or on the application -*

*(a) whether any person who has been .....*

*(b) whether any of the persons to be added as a party namely*

*(i) any person who ought to have joined the party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be .....and completely determine and adjudicated upon, or (ii) (ii)any person between who and any party to the cause or matter there may exist a*

*question or issue arising out of or relating to or connected with any relief or remedy which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter"*.

15. Furthermore Order 15, rule 6 (5) provides:-

*"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 the 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 sub paragraph (i) of the provision to paragraph or (1) (d) of the Limitation Act and the Court directs that those provisions should 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. In this proceeding the relevant limitation period is 3 years from the date on which the accident occurred.*

16. Section 4 (1) of the Limitation Act [Cap 35] deals with the Limitation of actions of contract and tort, and certain other actions and states as follows-

*4.-(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-*

- (a) actions founded on simple contract or on tort;*
- (b) ...*
- (c) ...*
- (d) ...*

#### ANALYSIS and DETERMINATION

16. In this case, the Plaintiffs have filed and served an application to join Joachim Soecker and Taveuni Development Company Limited as the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to this action respectively.

17. This application is made in support of the affidavit of the Plaintiff, Carl Zoeller coupled with the Amended Statement of Claim which according to the Plaintiffs sets out the following material facts which in fact should lead to the conclusion that the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants should be joined as parties to this proceedings-

- (i) The proposed 3<sup>rd</sup> Defendant was at all material times the contact person for the 1<sup>st</sup> Defendant;
- (ii) The proposed 3<sup>rd</sup> Defendant was at all material times an agent of the proposed 4<sup>th</sup> Defendant;
- (iii) The 3<sup>rd</sup> Defendant, in August 2006, made representations to the Plaintiffs which induced them to enter into an Agreement for sale and purchase of Certificate of Title No. 28655 which proved to be false and or a misrepresentation, leading to a severe detriment on the Plaintiff's part;
- (iv) The proposed 4<sup>th</sup> Defendant was at all material times the entity that had been paid the deposit sum and had also been the developer of the land to the best of the Plaintiff's knowledge.

*(Underline is mine for deliberation)*

18. Bearing in mind the abovementioned application, this court needs to deliberate upon the following two (2) issues-

- (i) Whether the provisions of the Limitation Period is applicable in this proceedings; AND
- (ii) Whether Joachim Soecker and Taveuni Development Company Limited be joined as the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to this action respectively, in light of the (expiration) of the Limitation period?

19. *Section 4 (1) of the Limitation Act [Cap 35]* states that the actions founded on simple contract shall not be brought after the expiration of six (6) years from the date on which the cause of action accrued.

20. Section 23 of the Limitation Act states that-

*"Where an action has been commenced within any period of limitation prescribed by this or any other Act and after the expiry of such period, it transpired that there has been mis-joinder or non-joinder of any party to the action, the court may order that any other party may be joined in the action not withstanding that the period of limitation has expired against that other party"*

21. In *Dorney v. Sunflower Airlines Limited and Another High Court, Suva Civil Action No. 460 of 1989 (25 November 1914)* his Lordship Justice Pathik (as he then was) allowed joinder of party pursuant to *Section 23 of Limitation Act* and stated as follows:

"It is not that an amendment cannot and will not be allowed in an application of this nature for in *WELDON* (supra) at p.395 LORD ESHER, M.R. said that "under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so." However, in the case before me the said section does vest certain discretionary powers in the Court when the section uses the words "the court may Order that any other party may be joined" (underlining mine). The Court no doubt will only permit 'joinder' if in all the circumstances of the case if there is good reason for doing so. Parliament has not defined or sought to limit the circumstances in which or the extent to which the Court may allow "joinder" (*ASIANAC INTERNATIONAL PANAMA S.A. v TRANSOCEAN RO-RO CORPORATION*) 1990 Vol I LLOYD'S LAW REPORTS p.150 at 153. No case has been cited on the interpretation of the said section, evidently there is no authority on this aspect of the matter. In the circumstances of this case, I am satisfied that pursuant to the overall discretion to allow for 'joinder' I have come to the conclusion that it is just to grant the application."

22. The Fiji Court of Appeal in *Land Transport Authority v. Lal* [2008] FJCA 79; ABUI0053 2007S (7 November 2008) stated as follows:-

"It cannot be doubted that a High Court judge has the discretionary power under the High Court rules to allow the amendment of a claim by the addition of a new cause of action or the addition of a new party to the proceedings at any time (subject to certain qualifications), even where to do so gives rise to a claim being made against a newly added party outside a limitation period fixed by statute (see also s23 of the Limitation Act). But the exercise of the discretion in allowing such amendments must, as always, be exercised in a principled and considered manner."

23. The Court of Appeal adopted with approval the following statement of Lord Keith in *Kettemen & Ors v. Hansel Properties Ltd & Ors* [1987] 1 A.C. 189 at 203:-

"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...the rule is that the 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..."

24. Also *Order 15 Rule 6(1) (2), (3) and (5) of the High Court Rules* gives court a very wide power to allow joinder of a party to ensure the determination of all the issues in a proceedings pending before it and provides as follows :-

*“6.- (1). no cause or matter shall be defeated by reason of the misjoinder or no joinder or any party; and the court may determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.*

*(2) Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application –*

*(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;*

*(b) order any of the following persons to be added as a party, namely –*

*(i) any person who ought to have joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon,*

*(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy in which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.*

*(3) An application by any person for an order under paragraph (2) adding him as a party must, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.*

*(4) ...*

*(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."*

25. In *Lucy -v- W. T. Henleys Telegraph Works Co. Ltd Imperial Chemical Industries Ltd* [1970] 1 QB393 at 404 p Lord Denning said;-

*"It gives the court power to add a person as a defendant if his presence is necessary to ensure all matters in dispute are effectively and completely determined;"*

26. This rule operates in congeniality with the general proposition of law that multiplicity of actions arising out of the same fact amounts to abuse of the process of the Court.

27. The cause of action in this instant case arose on 23<sup>rd</sup> August, 2006 since the 'Intend to purchase agreement' was entered into and executed between the Plaintiffs and the Defendants on 23<sup>rd</sup> August, 2006. Commencement of any action should have been done within a six (6) year time frame since the 'Claim is founded on Contract' claiming "Damages" based on breach of covenants of an "intend to purchase agreement'. Upon the perusal of the court records, it reveals that the action in fact was commenced within the Limitation time frame on 22<sup>nd</sup> May, 2008.

28. However, the Plaintiffs have on 28<sup>th</sup> March, 2013, filed an interlocutory application for Summons for Joinder to join Joachim Soecker and Taveuni Development Company Limited as the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to this action, after a lapse of some seven (7) years which is outside the Limitation time frame in Law.

29. This court has taken note of the fact that on a Notice of Motion dated 05<sup>th</sup> August, 2010, this court delivered a Judgment on 18<sup>th</sup> Day of January, 2013, making a finding that the " Agreement" entered upon between the parties herein on 23<sup>rd</sup> August, 2006, was "Void ab initio".

30. Bearing in mind the above finding of the Court, and that the substantive action was commenced on the foundation that damages are sought based on the breach of covenants of an "intend to purchase agreement', does a cause of action still exist in



this proceedings? Presently, there is no application before this court to determine whether there is a cause of action in the within action or not, rather determine whether the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants should be joined as parties to this proceedings.

31. Reference is made to the Affidavit in Reply deposed by Joachim Soecker (proposed 3<sup>rd</sup> Defendant) on 21<sup>st</sup> January, 2014 at paragraph, 6 (a), he admits being a Real Estate Agent, at paragraph 7, he admits a deposit of USD\$145,200 was paid by the Plaintiffs to be held on Trust by the 2<sup>nd</sup> Defendants. This has been further confirmed by the Counsel representing the 2<sup>nd</sup> Defendant in his submissions to court.
32. Further, the affidavit in Support of the Plaintiff, Karl Zoeller, at paragraph 5 deposes *"that my first dealing in respect of the proposed purchase of Certificate of Title No. 28655 had been with one Joachim Soecker. He held himself out as being a real Estate agent brokering a deal between myself and the 1<sup>st</sup> named 1<sup>st</sup> Defendant. The intended purchaser was to have seen myself and the 2<sup>nd</sup> named Plaintiff purchase the property after having built on it a residential building. The agreement that was signed has now been declared to have been void ab initio in a judgment delivered in this matter on 18<sup>th</sup> January, 2013"*.
33. There is documentary evidence on the court file within the Plaintiff's affidavit at paragraph 5 wherein he deposes *"that the cheque payment I made in respect of a deposit towards purchase and construction was made out to Taveuni Development Company, in the sum of USD\$145,200 (marked as "KZ-1")"*.
34. What then happens or is to be done about the sum of USD\$145,200 already paid by the Plaintiffs to the proposed 4<sup>th</sup> Defendant, Taveuni Development Company? No party to the proceedings including the proposed 4<sup>th</sup> Defendant can be said to have been unjustly enriched.
35. Paragraph 20 of the 'intend to purchase agreement' which has been ruled void ab initio, states as follows-

*"This contract is subject to the consent of the Minister of Lands under the Land Sales Act to the sale and purchase (if required). Each party undertakes to use its or his best endeavors to obtain such consent. If such consent is not obtained within eight months of the date hereof or such later date as may be agreed upon between the*

*parties this contract shall be of no effect and shall not be binding on the parties and the deposit shall be refunded to the purchaser free of interest".*

36. There is no evidence before this court whether any ministerial consent to date has been obtained or not and whether the transaction between the parties have been concluded.
37. Perhaps, the status quo of the matter remains unresolved so far.
38. There are tribal issues impending courts just and fair determination of the matter, and the same can only be concluded by allowing the Plaintiff's application for joinder, to join Joachim Soecker and Taveuni Development Company Limited as the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to this action respectively.
39. It is absolutely necessary that Joachim Soecker and Taveuni Development Company Limited be joined as 3<sup>rd</sup> and 4<sup>th</sup> Defendants to the present proceedings.
40. Ultimately the parties' presence in the appropriate capacity in Court will ensure a complete and full adjudication of all issues of liability and damages pertaining to the respective parties.
41. In this instance the issue of liability to plaintiff and contribution between the tort-feasors necessitates the joining of the parties as 3<sup>rd</sup> and 4<sup>th</sup> defendants.
42. For the aforesaid reasons, I am satisfied that the Plaintiffs have discharged the burden in terms of the application. Accordingly, I do not have any hesitation to allow the application for the joinder, accordingly.

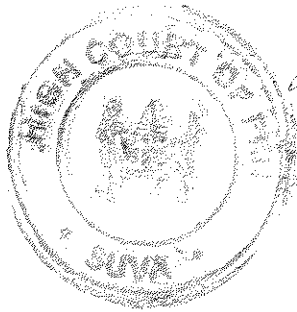
## CONCLUSION

43. For the foregoing reasons, I am satisfied that the application for the joinder be allowed and I so order accordingly.

44. The amended writ is to be filed and served to all the parties including Joachim Soecker and Taveuni Development Company Limited as 3<sup>rd</sup> and 4<sup>th</sup> Defendants by 02<sup>nd</sup> December, 2015.

45. Any defences thereto, to be filed by 16<sup>th</sup> December, 2015. I will adjourn this matter to 26<sup>th</sup> January, 2016 at 9 am for further directions.

Dated at Suva this 17<sup>th</sup> day of November, 2015



.....  
**VISHWA DATT SHARMA**  
**Master of High Court, Suva**