

IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 132 of 2014

BETWEEN: **SWARAN LATA** of Vatulaulau, Ba, Domestic Duties as the Administratrix of the Estate of **NISCHAL PRATAP** late of Vatulaulau, Ba, Fiji, Farmer.

PLAINTIFF

A N D : **KUNAL KRISTESH NAND** of Kumkum, Ba, Fiji, Driver.

FRIST DEFENDANT

A N D : **THE FIJI SUGAR CORPORATION LTD** having its registered office at Level 3, Western House, Private Mail Bag, Lautoka.

SECOND DEFENDANT

A N D : **LAL'S DIGGING WORKS LIMITED** having its registered office at Yash Law, Barristers & Solicitors, 131 Vitogo Parade, Lautoka and **KUNAL KRITESH NAND** of Kumkum, Ba, Fiji, Driver.

THIRD PARTIES

Appearance

For the 2nd defendant : Mr S Krishna

For the plaintiff : Mr N Padarath

For 1st defendant : No appearance

3rd parties : No appearance

Date of Hearing : 4 March 2016

Date of Ruling : 4 March 2016

R U L I N G

Introduction

- [01] This ruling concerns with an application supported by an affidavit filed on 8 December 2015 by 2nd defendant to seek leave of the court to amend its statement of defence.
- [02] The application is made pursuant to Order 20 Rules (5) of the High Court Rules, 1988 (*HCR*) and the inherent Jurisdiction of the Court.
- [03] The plaintiff did not file any affidavit in opposition. Instead, Mr Padarath counsel appearing for the plaintiff brought to the notice of the court that the plaintiff does not intend to oppose the application filed by the 2nd defendant to amend its statement of defence. However, the court having observed that the amendment replaces the previous statement of defence in its entirety asked the 2nd defendant to file legal submission on the issue that whether the court could grant leave to replace its statement of defence by way of amendment. The 2nd defendant accordingly filed a legal submission. I am grateful to counsel for the 2nd defendant for that.

Background

- [04] On 13 August 2014, as administratrix of the Estate of Nischal Pratap, Swaran Lata, the plaintiff brought these proceedings against the defendants claiming damages. The claim is grounded on an accident where the first defendant drove the 2nd defendant's, ('FSC') vehicle and collided with Nischal Pratap ('the deceased') and caused the death of the deceased. On 5 September 2014 the Second Defendant through their in-house solicitors filed the Statement of Defence. The Second defendant thereafter appointed Messrs Krishna & Co as their solicitors by Notice of Change of Solicitors dated 22 January 2015. On 22 June 2015 the Master of the High Court granted leave to join parties. On 24 June 2015 the Third Party Notice was issued against Lal's Digging Works Limited and Kunal Kritesh Nand as the Third Parties. It is interesting to note that 1st defendant is also one of the third parties in

these proceedings. On 8 December 2015, the Second Defendant filed the Summons seeking leave to amend the Statement of Defence.

The Law

[05] Amendment of writ or pleading with leave may be made pursuant to HCR Order 20, rule 5 which so far as relevant provides as under:

*5.-(1) Subject to Order 15, rules 6, 8 and 9 and the following provisions of this rule, **the Court may at any state of the proceedings allow the plaintiff to amend this 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)...

(3)...

(4)...

*5.-(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 rises 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.***

The governing Principals

[06] The governing principles of amendment of pleadings were discussed in *Reddy Construction Company Ltd v Pacific Gas Company Ltd* (1980) FJCA 9; (1980) 26 FLR 121 (27 June 1980) 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 contrast 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”.

[07] In the case of **Vuluma v Merchant Finance & Investment Company Ltd** [2015] FJHC 57; HBC 306.2007 (26 January 2015) I (sitting as Master) quoted at paragraph 9 the case authority of **Tildesley v Harper**, 10 ch D pp. 396, 397, where Bramwell, L.J said:

“My practice has always been to give to amend unless I have been satisfied that the party applying was acting mala fide, or that, by this blunder, he had some injury to his opponent which could not be compensated for by costs or otherwise: “However, negligence 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 costs”.

[08] In Vuluma, I stated at para [12] that:

‘[12] The Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend this pleadings, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct, see O.20, r.5 (1). 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. However, the later then amendment the greater is the chance that it will prejudice other parties or cause significant delays, which are contrary to the interest of the public in expeditious conduct of trials. When leave to amend is granted, the party seeking the amendment must

bear the costs of the party wasted, as a result of it, see Peter Sujendra Sundar & Anor V Chandrika Prasad [1997] ABU 22/97 (apf HBC 233/93) Decision 10 November 1997).'

Discussion

- [09] The second defendant has applied for leave to amend its statement of defence filed on 5 September 2014. The application for leave has been made after the close of the pleadings. The court has power, under HCR O.25, r.5 (1) to grant leave to the parties to amend their pleadings at any stage of the proceedings on such term as to costs or otherwise as may be just and in such manner (if any) as it may direct.
- [10] The present statement of defence filed on behalf of the second defendant barely denies all the allegations of facts including the accident which is the subject matter of the action and seeks dismissal of the action in its entirety.
- [11] The proposed amendment to the statement of defence replaces the previous statement of defence filed by the second defendant's former in-house solicitor. The proposed amendment inter alia admits vehicle registration number CX 434 involved in an accident but denies that the second defendant was the registered owner of the vehicle at the time. The proposed defence also claims that the third parties were responsible for the accident where the second named third party drove the vehicle as servant or agent of the first named third party.
- [12] It is to be note that the proposed amendment not only replaces the existing statement of defence but also provide a distinct defence or claim to be raised for the first time. However, I have read the statement of claim and the proposed defence to the claim. It is ostensible that the proposed defence arises out of same cause of action. The court could allow an amendment notwithstanding that

the effect of the amendment will be to add or substitute a new cause of action if the new cause of action rises out of the same facts, see r.5 (2).

- [13] The amendment should be allowed if it can be made without injustice to the other side. There will be no injustice if the other side can be compensated by costs, see **Tildesley**'s case above.
- [14] The plaintiff did not object to the statement of defence being amended or a new statement of defence being filed replacing the existing one. It is apparent that the plaintiff will not be prejudiced. Nor is there any injustice to the plaintiff if the amendment is allowed.
- [15] The first defendant and the third parties have already defaulted in appearance that there is no objection raised on their behalf to the second defendant's application to amend the statement of defence.
- [16] There is nothing before the court to suggest that the second defendant is acting mala fide in making this application for amendment to the statement of defence.
- [17] I am satisfied the proposed amendment to the statement of defence arises out of the same facts as a cause of action in respect of which relief has already been claimed by the second defendant. I am also satisfied that the proposed amendments are necessary to enable the court to determine the real issues in controversy between all parties. I would therefore grant leave to the second defendant to amend its statement of defence as proposed. I would make no order as to cost.

Final result

- (i) Leave is granted to the second defendant to amend its statement of defence as proposed.
- (ii) The amended statement of defence is to be filed and served within 7 days.

- (iii) The plaintiff is to file and serve reply to the amended statement of defence within 14 days thereafter.
- (iv) No order as to cost.
- (v) The matter is adjourned for mention before me at 9.30 on 29 March 2016.



M H Mohamed Ajmeer
4/3/16
.....
M H Mohamed Ajmeer
JUDGE

At Lautoka

This 4th March 2016