

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

Civil Action: HBC 38 of 2013

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

FIRST PLAINTIFF

A N D: MBM COMPUTER SUPPLIES PTY LIMITED a limited liability
company having its registered office at 6 Mary Kingaroy QLD,
4610, Australia.

SECOND PLAINTIFF

A N D: CRYSTAL CLEAR MINERAL WATER (FIJI) LIMITED a limited
liability company having its registered office at Lot 20,
Waqadra Industrial Sub Division, Namaka, Nadi

DEFENDANT

Counsel : Mr Rupesh Singh for the plaintiffs
: Ms Barbara Doton for the defendant

Date of Hearing : 02 February 2016

Date of Ruling : 17 March 2016

R U L I N G

The Application

[01] This is an application for discovery of particular documents filed by the plaintiff. The application has come up at the trial stage, i.e. few weeks before the trial date. The Plaintiffs rely on the Affidavit of Bruce John Currie sworn on the 8th day of December 2015 and filed in the proceedings herein on the 14th day of January 2016 in support of the application.

[02] By summons dated 18 January 2016 ('the application') the plaintiff seeks orders as under:

1. That the Defendant do within seven (7) days of an Order being made, by way of affidavit, provide the 1st and 2nd Plaintiff's to the 1st and 2nd Plaintiffs satisfaction the following:
 - i) *Financial reports, exhibiting the Assets, Liabilities, Contingent Liabilities, Profit and Loss Statement for the period 2002 till to date of the Defendant.*
 - ii) *Copies of all correspondences between the Defendant and its Directors with the 1st and 2nd Plaintiff and company files, notes and all memoranda, minutes of meetings and resolution in respect of the purchase of;*
 - iii) *a. Chiller 108W in October 2004*
 - b. Machines (as per Purchase order no. 35620)*
 - *Videojet 43s inkjet corder/printer#810086*
 - *Tronics S/S Automatic Labelling Machine plus Wrap Conveyor*
 - *March UNICORN – Large Character Coder Complete #M21494*
 - *INK – BLACK Carton 12 Pack #M20943*
 - *SOLVENT – Carton 12 Pack #M20947*
 - c. Machines (as per proforma invoice dated 6/2/06)-*
 - *Sidel SBO 10 Moulding Machine (made in France) – with hopper and conveyor, feeder, serial 8154, type: VH15H3N Conveyor, saw – eurodrive SA32, D1714D, made in Australia*
 - *Air Cylinder stainless steel made in Australia*
 - *Set 500 ml moulds, and range of spares made in Australia and France*
 - *Belliss&Morcam Compressor 40 bar made in England*
 - *Dryer and accessories made in Australia*
 - d. All correspondences, company files, notes, all memoranda, minutes of meetings and resolutions including emails dealing with the purchase of Aqua Fiji 1 litre, 1.5 litre and 600ml front labels between 16th August till 4th March 2005.*
 - e. All correspondences, company files, notes, all memoranda, minutes of meetings and resolutions in respect of payments made by the Defendant and payment by 1st Plaintiff on behalf of the Defendant to PIPERS Patent & Trade Mark Attorneys in Brisbane Australia.*
 - f. Copies of all emails, correspondences and letters exchanged between the Plaintiffs and Defendant in relation to the goods and services paid for by the Plaintiff on behalf of the Defendant.*

[03] The Defendant opposes the Plaintiffs' application and has filed the Affidavit of Mohammed Altaaf on the 28 January 2016.

The Background

[04] The chronology of the case setting out the nature and numerous applications filed since institutions is as follows:

8 th March 2013	The Plaintiff instituted the proceedings herein against the Defendant by way of Writ of Summons.
22 nd March 2013	Defendant filed Acknowledgement of Service.
18 th April 2013	Defendant served the Plaintiff with its Statement of Defence.
28 th August 2013	Plaintiff filed Summons to enter Summary Judgement against the Defendant.
19 th September 2013	Defendant filed Affidavit of Mohammed Altaaf in Opposition.
6 th March 2014	Defendant consented to withdrawal of Summary Judgment application by Plaintiff subject to cost.
28 th February 2014	Plaintiff filed Amended Statement of Claim to include Second Plaintiff.
16 th March 2015	Plaintiff filed Amended Statement of Claim to include Second Plaintiff
1 st June 2015	Court granted orders in terms of Summons for Directions which included directions for parties to file their respective Affidavits verifying their list of documents.
15 th June 2015	Plaintiff filed Affidavit Verifying List of Documents.
15 th July 2015	Defendant filed Affidavit Verifying List of Documents.
27 th November 2015	Matter set for hearing on the 15 th and 16 th February 2016.
14 th January 2016	Plaintiffs file summons for Specific Discovery.

The Law on Specific Discovery

[05] The Plaintiff relies on Order 24 Rule 3(1) & 7 of the High Court Rules 1988, as amended ('HCR') which runs:

Order for discovery (O.24, r.3 (1))

“Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and serve a copy thereof on the other party.”

‘Order for discovery of particular documents (O.24, r.7)

7.-(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it.

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.

(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.

Discovery to be ordered only if necessary (O.24, r.8)

“On the hearing of an application for an order under 3 or 7, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any

case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.”

The Plaintiffs' Claim

[06] In March 2013 the Plaintiffs brought this action through writ of summons with statements of claim endorsed against the defendant claiming the sum of AUD\$1,210,589.00 and interest.

[07] The writ did not provide particulars of the claim. The plaintiffs amended their statement of claim. Even the amended statement of claim does not provide sufficient particulars. The amended statement of claim states that, *it was agreed between the Defendant and the Plaintiff (‘the agreement’) that the First and Second Plaintiff would pay for and provide financial assistance for the purchase of goods and services abroad in Brisbane, Australia for and on behalf of the Defendant and the sums expended for the purchase of these goods and services would be treated as monies paid on account of the Defendant and be paid back to the First and Second Plaintiff by the Defendant (see, paras 5 & 6).*

[08] The plaintiffs without providing the particulars of the alleged agreement, they simply state that the particulars of which are well known to the defendants.

[09] The defendant by its amended statement of defence denies the existence of any agreement and states the claim is statute barred and therefore ought to be struck out.

[10] The plaintiffs seek discovery of particular documents dated from 2004 to 2006.

The Submissions

Plaintiff

[11] The plaintiff's primary submissions were that, the only objection that should be considered by the court in the objection on relevance as this is the factor the court considers in an application made pursuant to O.24 rr.3 and 7, HCR. The information sought is relevant to the proceedings and required for a fair trial.

Defendant

[12] The defendant submits that, the relevance of a document is to be tested against the issues and/or questions raised by the pleadings. The onus is on the applicant to show that the documents sought to be discovered are relevant in the proceedings and relevancy is deduced for the pleadings. The plaintiff's affidavit in support alleges in paragraph 10 that the defendant has not disclosed all papers and documents that are or have been in the defendant's possession, custody or power relating to the matters in questions in the cause of action. The cause of action is based on a purported agreement to supply goods and services, however, there are no particulars of the said agreement the plaintiff's claim.

The Decision

[13] This is the plaintiff's application made under O.24, r.7, HCR for discovery of specific documents stated in his affidavit. The plaintiff has filed this application few weeks before the trial of the matter which was set down on 16 February 2016.

[14] The Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application is, or has at any time been, in his possession, custody or power, and if

not then in his possession, custody or power, when he parted with it and what has become of it (r.7 (1)).

[15] The application must be supported by an affidavit as required in r. 7 (3). In compliance with that requirement the plaintiff filed an affidavit along with the application.

[16] The application supported by an affidavit must state the deponent's belief that the party from whom discovery is sought has, or at some time had, in his possession, custody or power the document, specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.

[16] The plaintiff in his affidavit states that, the requested information is relevant to the controversy before the court should have been disclosed in the defendant's list of documents, and as ought to be disclosed copies given to his solicitors.

[17] The defendant in its affidavit states that, the requested documents are not relevant to the matter in question and nor is it important for the determination of the pleaded issues. The affidavits further states that, the defendant does not have the requested documents in its possession, save as for the defendant's annual financial report up until the year 2012 when the defendant ceased operation.

[18] The relevance of a document sought to be discovered was discussed in ***AB Annand (Christchurch) Limited v ANZ Limited (1997) 43 FLR 22*** where Fatiaki J held that:

“Quite plainly in order that any document may be discoverable it must firstly be shown To relate to (some) matter in question in the case” in other words the document must be relevant to a question or issue in the proceedings in so far as the same may be deduced from the pleadings in the action.”

[19] The plaintiff claim is grounded on an agreement allegedly made between the defendant and the plaintiffs that the plaintiffs will pay and provide financial assistance for the purchase of goods and services for and on behalf of the defendant and the sum expended for the goods and services would be treated as monies paid on account of the defendant and be paid back to the plaintiffs by the defendant.

[20] It will be noted that there is not particulars as to the date, where the agreement was entered into and the nature of the agreement whether it was oral or written.

[21] The plaintiffs' seek to discover machine's purchase order pro forma invoice, all correspondences, company files, notes of all memoranda, minutes of meetings and resolutions including emails dealing with the purchase of Aqua Fiji 1 litre, 1.5 litre and 600ml front label between 16 August 2004 and 4 March 2005.

[22] The documents sought to be recovered relate to the period between August 2004 and March 2005. The plaintiffs took out the writ against the defendant in March 2013.

[23] The court has a wide discretion when to order discovery in the interest of justice. But it is, generally, inexpedience and unnecessary to do so issues have been defined by the pleadings (*R. H. M. Foods Ltd v. Bovril Ltd* [1982] 1 W.L.R. 661; [1982] 1 All E.R. 673, CA). But if inspection is so desirable that it is very nearly essential before statement of claim it will be ordered. *Dun and Bradstreet Ltd v. Typesetting Facilities Ltd* [1992] F. S. R. 320, see *The Supreme Court Practice 1999*, Vol. 1, 24/3/5.

Conclusion

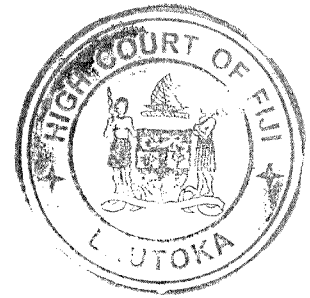
[24] In my analysis the documents sought to be discovered not related to one or more of the matters in question in the cause or matter. Therefore discovery of those documents are unnecessary. Furthermore, the issues have been finalised by the pleadings. The plaintiffs could

have discovered those documents before the issuance of statement of claim if they were very essential to the claim. I would therefore refuse to order for specific discovery. I would order the plaintiffs to pay summarily assessed costs of \$400.00 to the defendant.

The result

- (i) Plaintiff's application for specific discovery is refused.
- (ii) Plaintiff will pay summarily assessed cost of \$400.00 to the defendant in 14 days.

M H Mohamed Ajmeer 17/3/16
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M H Mohamed Ajmeer
JUDGE



At Lautoka
17 March 2016

Solicitors: Messrs Patel and Sharma, Barristers & Solicitors for the Plaintiff
Messrs Rams Law, Barristers & Solicitors for the Defendant