IN THE HIGH COURT OF FIJI

WESTERN DIVISION AT LAUTOKA

HBC No. 127 of 2012

BETWEEN : **PETER ALLAN LOWING** of 1404 Hilton Hotel, Denarau Island, Fiji

PLAINTIFF/RESPONDENT

A N D : **QBE INSURANCE (FIJI) LIMITED** of QBE Centre, Victoria Parade, Suva

DEFENDANT/APPELLANT

Appearance : Mr. Ronal Singh for defendant/appellant
Ms. S Tabuadua for plaintiff/respondent

Date of Hearing : 26 August 2016
18 January 2017

J U D G M E N T

Introduction

[01] This is an appeal, with leave being granted by me, against the decision of the learned Master dated 4 December 2015, whereby he refused the defendant's application to further amend the amended statement of defence and ordered the defendant to pay costs of $1000.00 to the plaintiff.

[02] At the hearing of the appeal, both parties made oral submissions. I also have benefit of reading their written submissions for which I am grateful to both counsel.

Background

[03] The plaintiff brings his claim in 2012. The matter is still at discovery stage. The delay in the matter has been largely due to the plaintiff's inaction. At one stage (in September 2013) the court on its own motion acting under Order 25, rule 9 of the High Court Rules caused the matter to be listed for show cause for non-prosecution for nearly one year. The plaintiff then appeared and gave his explanation. The court gave final chance to the plaintiff to prosecute the matter with due diligence. By its order dated 17 October 2013 the court told the plaintiff that failure to comply with the directions will lead the plaintiff's claim to be struck out.

[04] On 31 October 2013, the plaintiff files his amended statement of claim and states that he was the owner of the motor vessel "The Office" (the vessel) and claims that he purchased the vessel for $65,000.00 but insured it for $100,000.00 after spending about $35,000.00 on vessel refitting and repairing the same. The plaintiff insured the vessel, which tipped over and sunk due to the peril of the sea.

[05] The defendant (QBE) filed its amended statement of defence and counterclaim on 8 November 2013 (defence) denying liability on the basis that the vessel was not seaworthy.

[06] At the discovery stage, QBE discovered additional documents that showed that the plaintiff was not the owner of vessel as claimed by the plaintiff in his amended statement of claim. As a result, the QBE applies to the Master for leave to amend its defence. The Master refuses leave. QBE appeals to this court.

The Master's Ruling

[07] By his ruling delivered on 4 December 2015 (Ruling), the learned Master ordered that:-

(1) The Defendant's application seeking leave to further amend the Amendment Statement of Defence is refused.

(2) The Defendant is ordered to pay costs of $1,000.00 (summarily assessed) to the Plaintiff which is to be paid within 14 days from the date hereof.

Grounds of Appeal

[08] The grounds of Appeal, which QBE relies upon are as follows:

1. The Learned Master misdirected himself in law and failed to exercise his discretion judicially and in accordance with applicable legal principles in Fiji in not granting the Defendant leave to further amend its statement of defence. In doing so the Master failed or neglected to give adequate consideration to Order 20, rule 5 of the High Court Rules 1988 (Rules) and established legal principles in favour of allowing an amendment to the defence that –

   (i) the proceedings are at an early stage;

   (ii) the Plaintiff will not be prejudiced in any way as the Plaintiff will have an opportunity to reply to the amended defence and respond to the pleadings by way of evidence;

   (iii) contrary to his finding, the amendment is necessary for the purposes of determining the real questions in controversy between the parties;

   (iv) it was in the interests of justice that the proposed amendments be allowed.

2. The learned Master erred in law and fact and failed to exercise his discretion judicially and in accordance with applicable legal principles in finding that the proposed amendments had no prospects of success, inter alia-

(a) By considering and deciding matters, such as whether the plaintiff had an insurable interest, had failed to disclose all material facts and had made false representations, adversely to the Defendant, when –

(i) these were matters for the trial of the action; and

(ii) alternatively there was in any case no relevant evidence on any of these matters before the Court;

(b) By misdirecting himself in regard to the issue of "insurable interest" when applying section 5 of the Marine Insurance Act (Cap. 218) and by applying principles applicable to general insurance to the policy of marine insurance which is in issue in the proceedings;

(c) Further or alternately, by finding that "The Plaintiff has an insurable interest in the vessel since he was in possession of the vessel at all material times. Moreover he benefited from its existence and he suffered a loss by its destruction. He had a direct relationship with the property", when –

(i) these matters were irrelevant to whether an insurable interest existed for the purposes of a marine insurance policy; and

(ii) there was no evidence to support these findings;

(d) Further or alternatively by applying the case of *Jadu Nadan v Queensland Insurance Co Ltd* [1992] FJCA 37; [1992] and in finding –

(i) the Plaintiff is the beneficial owner of the Vessel;

(ii) the representation made by the Plaintiff to the Defendant that Plaintiff owned the Vessel was an honest misrepresentation and

(iii) non-disclosure of ownership was not necessarily material to the risk the Defendant undertook;

(iv) the Plaintiff had an equitable title to the vessel;

When –

(v) that case was not applicable;

(vi) the issues were not relevant; or

(vii) alternatively, if relevant, these were issues to be determined after the trial of the action; and

(viii) alternatively, there was no evidence before the Court to support those findings;

(e) By findings no evidence was adduced by the Defendant to demonstrate that the risk would have been different or that the premium would have been more or less, when –

(i) those issues were not relevant; or

(ii) alternatively, if they were relevant, they were matters for the trial; and

(iii) in any event, the Defendant had no burden of proof in regard to them;

(f) By finding that the Defendant's proposition that "*the Plaintiff's ownership and insurable interest in the property is relevant to determine the real controversy between the parties is a far cry from the provisions of the Marine Insurance Act (Cap. 218) and the rule of law enunciated in Nadan v Queensland Insurance Co Ltd, [1992] FJCA 37, Stock Inglis, (1884), 12 QBE 465,* ***Lucean v Crawford*** *(1806) 2 B & PNR 26,* ***Dobson v Sotheby*** *(1827) Moo & M 90, 93*" –

(i) by misdirecting himself on the provisions of the Marine Insurance Act (Cap. 218); and

(ii) by relying on the cases which were not relevant to the policy of marine insurance in issue; or

(iii) by deciding an issue which was one for the trial; and

(iv) further there was in any event no evidence to support that finding;

(v) by concluding that the Plaintiff's ownership and insurable interest were not relevant to determine the real controversy between the parties.

3. The learned Master erred in law and failed to exercise his discretion judicially and in accordance with applicable legal principles by holding that the Defendant was acting *mala fide* in relation to the proposed amendments *inter alia* –

(a) by misdirecting himself on the principles applicable to *mala fides*;

(b) by finding that the proposed defences were not material at the time of the commencement of the insurance, the payment of premiums thereunder and the denial of the loss claim, when –

(i) There is no legal principle that precludes the Defendant from raising new matters in its proposed defences; and

(ii) Alternatively there was no evidence to support those findings;

(c) by finding that it was absurd to say that the proposed amendments were based on discovery of documents from the Plaintiff because such documents were in the Defendant's power to possess at the commencement of the insurances, when it –

(i) Was the Plaintiff's duty to make full material disclosure of the matters disclosed by the documents prior to the inception of the policy; and

(ii) The Defendant was not required to establish then at the commencement of the insurance;

(d) By finding that –

(i) There was no reason why the alleged misrepresentation and non-disclosure by the Plaintiff in relation to the ownership of the vessel was material to the risk that the Defendant undertook; and

(ii) No evidence was adduced by the Defendant to demonstrate that the risk would have been different or the premium would have been more or less;

when –

(iii) these matters were not relevant;

(iv) alternatively, if they were relevant, they were matters for the trial; and

(v) in any event were matters in regard to which the defendant bore no burden of proof.

4. Further and alternatively, the Learned Master erred in law and failed to exercise his discretion judicially and in accordance with applicable legal principles by failing to consider each of the Defendant's proposed affirmative defences separately, and by failing to consider the Defendant's proposed Fourth Affirmative Defence and a number of other amendments at all.

The Proposed Amendment

[09] In the proposed amendment, QBE intends to incorporate certain fresh facts, which it discovered at the discovery stage. The essence of which includes:

(i) *The plaintiff was nervous owner of the vessel and was never lawfully entitled to the owner of the vessel.*

(ii) *That the vessel was purchased by Lowing Nandan and Associates.*

(iii) *The boat was sold by Lowing Nandan and Associates. The boat value both before and after the storm is unknown and the boat was insured under an unvalued policy.*

(iv) *Liability is limited to the pre-loss market value of the vessel and salvage costs, less the deductible.*

(v) *The insurance policy issued by the defendant to the plaintiff was a policy of marine insurance to which the marine insurance act ("the Act") applied.*

(vi) *Section 5 of the Act provides that every contract of marine insurance is void where the assured does not have an insurable interest in the insured venues namely vessel.*

(vii) *The plaintiff, being the assured, did not have an insurable interest in the vessel in that:*

(a) It was purchased by Lowing Nandan and Associates, and not by the plaintiff;
(b) Lowing Nandan and Associates was the registered business name of Siddharth Nandan;
(c) The Plaintiff, not having been a Fijian citizen at any time during Lowing Nandan and Associates' ownership of the vessel, was not lawfully entitled to be the owner of the registered vessel (the vessel being so registered).

(viii) *For the reasons set out in paragraphs 21 to 23 above, the policy was void from inception.*

(ix) *Section 19 of the Act provides that the assured must disclose to the insurer before the contract conclude, every material circumstances that is known to him. If he failed to make such disclosure, the insurer may avoid the contract.*

(x) *Before conclusion of the contract of insurance on or around 12 May 2010, and before renewal on 12 May 2011, the defendant failed to disclose to the insurer the following materials circumstances:*

(a) He was not the purchaser of the vessel, the same having been purchased by Lowing Nandan and Associates;
(b) Lowing Nandan and Associates had a financial interest in the vessel;
(c) That the vessel was a registered vessel;
(d) He was not a Fijian citizen and was therefore not lawfully entitled to be the owner of a registered vessel;
(e) The sum insured for the vessel was $20,000 more than the purchase price.

(xi) *As a consequence of the failure to disclose material facts, the insurer is entitled to and does not avoid the contract.*

(xii) *Section 21 of the Act provides that every material representation made by the assured or his agent during the negotiations for the contract, and before the contract is concluded, must be true. If it is untrue, the insurer may avoid the contract.*

(xiii) *Prior to the conclusion of the contract on or about 12 May 2010, the plaintiff falsely represented to the defendant that he was the owner of the vessel.*

(xiv) *Prior to the conclusion of the renewal of the contract on or about 12 May 2011, the plaintiff (in a written proposal) falsely represented to the defendant that:*

(a) He was the owner of the vessel;

(b) The vessel was "not currently registered";

(c) The only "interested party" was the ANZ Bank (with no mention of Lowing Nandan and Associated).

(xv) *As a result of the false representations the insurer is entitled to and does avoid the contract.*

(xvi) *Section 42 of the Act provides that there is an implied warranty in every contract of marine insurance that the adventure insured is a lawful one.*

(xvii) *If the plaintiff was a true owner, whether legally or beneficially, of the vessel, the adventure insured was unlawful, in that the plaintiff, not being a Fijian citizen, was not lawfully entitled to own a registered vessel.*

(xviii) By virtue of section 34(3) of the Act, a breach of warranty, whether material to the risk or not, discharges the insurer from liability as from the date of the breach.

(xix) The defendant was accordingly discharged from liability from inception, namely 12 May 2010.

The Issue at Appeal

[10] The issue at the appeal was that whether the learned Master was correct in refusing to grant leave to the defendant to amend its statement of defence and counterclaim, especially on the ground that the proposed amendments to the amended statement of defence are not necessary to enable the true issue in controversy between the parties to be resolved and they have no real prospect of success.

The Law

[11] The rule governing amendments of pleadings is Order 20, Rule 5 of the High Court Rules 1988 ('HCR'). That rules provides:

Amendment of writ or pleading with leave (O.20, r.5)

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 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 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 used.

(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."

The Governing Principles

[12] The guiding principle relating to amendments is set out in paragraph 20/8/6 of the Supreme Court Practice 1999 (**White Book**), which states:

It is a guiding principle of cardinal importance on the question of amendment that generally speaking, all such amendments ought to be made "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defects or error in any proceedings.

[13] The test that is to be applied when dealing with an application to amend pleadings was set out by the Court of Appeal in **Sundar v. Prasad** [1998] FJCA 19; Abu0022u.97s (15 May 1998). In the case of **NBF Asset Management Bank v Taveuni Estates Limited & Others** [2014] FJHC 79; HBC 543.2004 (17 February 2014) [**Tab 1**], Justice Kumar applied the Court of Appeal's decision in Sundar and summarised other relevant cases as follows;

> 3.2 The test to be applied when dealing with Application to Amend Pleadings was stated by Full Court of Fiji of Appeal in **Sundar v Prasad** [1998] FJCA 19; Abu0022u.97s (15 May 1998) as follows:-
>
> > *Generally, it is in the best interest of the administration of justice that the pleadings in an action should state fully and accurately the factually basin of each party's case. For that reason amendment of pleadings which will have that effect are usually allowed, unless the other party will be seriously prejudiced thereby (G.L. Baker Ltd v Medway Building and Supplies Ltd [1958] 1 WLR 1231 (C.A.)).* ***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 other parties; if that test is mat, leave to amend any be given even at a very late stage of the trial*** *(Elders Pastoral Ltd v Marr (1987) 2 PRNZ, 383 (C.A.)). However, the later the amendment the greater is the change that it will prejudice other parties or cause significant delays, which are contrary to the interest of the public in the expeditious conduct of trials. When leave to amend is granted, the party seeking the amendment must bear the costs of the other party wasted as a result of it."*
>
> *3.3 In* ***Ambaram Narsey Properties v Khan*** *[2001] FJHC 306; [2001] 1 FLR 283 (16 August 2001) his Lordship Justice Gates (current Chief Justice) adopted with approval the following principles in* ***Cropper v Smith*** *(1884) 26 Ch. D. 700 Bowen L.J. said:-*

Now, I think it is a well-established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding other side than in accordance with their rights. Speaking for myself, and in conformity with that I have had laid down by the other division of the Court of Appeal and by myself as a member of, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace
and his Lordship added at page 711;

It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.

3.4 His Lordship further stated that:-

Amendment may be allowed "at any stage of the proceedings" which includes during a trial. The Duke of Buccleuch [1892] P.201, at p 211 per Lorf Esher MR; ***G. L. Baker Ltd v Medway Buidling & Supplies Ltd*** *[1958 1 WLR 1216. With some reluctance the trial judge was prepared to allow the statement of claim to be amendment in* ***Loufi v C Czarniow Ltd*** *(1952) 2 All ER 823 as late as after close of the case but before judgment.*

The Decision

[14] This is an appeal against the refusal of the learned Master to grant leave to the defendant to further amend its amended statement of defence and counterclaim. I propose to deal with each ground of appeal individually.

Ground 1- Applicable principles

[15] The proposed amendments to the amended defence are sought to be brought at the discovery stage. The court may allow amendment of the pleadings with leave ***'at any stage of the proceedings'*** (see O.20, r. 5 (1). 'At any state of the proceedings' in rule 5, in my opinion, would mean before the judgment is pronounced or delivered.

[16] Amendment may be allowed "at any stage of the proceedings" which includes during a trial. See the decision of His Lordship Justice Gates in *Ambaram's* case (above).

[17] The court has a general discretion to allow any party to the proceedings to amend their pleadings at any stage of the proceedings before judgment. However, this discretion need to be exercised judicially.

[18] 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 in costs (See *Clarapede and* ***Co. v Commercial Union Association*** (1883) 32 WR 262 and ***HIH Casualty and General Insurance Ltd v JLT Risk Solutions Ltd*** [2004] EWHC 1687 (Comm) TLT 26/7/2004).

[19] Mr Ronal Singh, counsel appearing for QBE submits that the proposed amendments are necessary to determine the real questions in controversy between the parties and that it is in the interest of justice that the proposed amendments be allowed.

[20] 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 other parties; if that test is met, leave to amend may be given even at a very late stage of the trial. See *Sundar v Prasad* [1998]

FJCA 19; Abu.97S (15 May 1998) and ***NBF Asset Management Bank v Taveuni Estate Limited & Others*** [2014] FJHC 79; HBC 543.2004 (17 February 2014.

[21] The plaintiff's counsel, objecting to the proposed amendments, submits that proceedings are not an early stage, prejudice will be caused to the plaintiff if the amendments are permitted at this stage and that the amendments are not relevant to determine the real issue in controversy.

[23] QBE intends to amend its defence at the discovery stage. This not very late stage of the proceedings. The court may allow amendments of the pleadings (defence in this instance) at any stage of the proceedings, which includes during the trial. Therefore, the contention that the amendments to the amended defence are brought at late stage of the proceedings, in my view, is baseless and needs to be rejected. I so do.

[24] Another objection raised by the plaintiff to the amendments is that there will be prejudice to the plaintiff if the amendments are permitted.

[25] It is to be noted that the plaintiff does not state any specific prejudice that would be caused to him if the amendments are allowed. The plaintiff merely states that the plaintiff will be prejudiced and there will be further delay. The defendant's amendments are ready to be filed if leave is granted. Amending to the defence will not cause further delay considering the delay that has been caused largely by the plaintiff. It is a matter of one or two months unless the plaintiff needs longer time to file his reply to the amended defence.

[26] Even if there were prejudice to the plaintiff by the amendments that can be compensated in costs. However, in this case the plaintiff did not substantiate that he will suffer prejudice if the proposed amendments are allowed other than saying that the proceedings will be delayed by the defendant's proposed amendments. If the court allowed the defendant to

go ahead with the proposed amendment, the plaintiff will have an opportunity and to amend his reply to defence and defence to counterclaim.

[27] The plaintiff's claim arises out of a Marine Insurance Policy he obtained with QBE. He insured the vessel, which was on the sea. Marine Insurance Act (the Act) would apply to the policy the plaintiff had with QBE in relation to the vessel. The defendant is entitled to plead and rely on the provisions of the Act. The proposed amendments raises issues of facts and law in relation to the plaintiff's insurable interest in the vessel.

Ground 2-Considering the prospect of success and insurable interest.

[28] The Learned Master decided that the proposed amendments to the defence had no real prospect of success. In his ruling the Master states that:

> *'Therefore, it in wrong to say that the Plaintiff has no insurable interest in the vessel in the absence of "ownership" of the vessel.*
>
> *I am therefore of the view that the proposed amendment to the Defence viz, "the ownership of the vessel", is not necessary for this Court to determine the real issue before the Court. I should add that the proposed amendment has no real prospect of success. The proposed amendment does not advance the Defence.'*

[29] The court may refuse to grant leave to any party to amend their pleading on the ground that the proposed amendment has no real prospect of success. This aspect need to be considered with great caution.

[30] A proposed amendment will be refused where the amended case has no real prospect of success (**Oil *and Mineral Development Corporation Ltd v Sajjad (2001) LTL 6/12/2001***).

[31] Permission to amend a pleading in a way which was speculative, pleading every conceivable cause of action in a way scattergun approach, and which sought to reverse the burden of proof, was refused in ***Clyde and Co. LLP v New Look Interiors of Marlow Ltd*** [2009] EWHC 173 (QB), LTL 13/2/2009.

[32] The proposed amendment suggested by QBE is necessitated after discovery of the fresh evidence at the discovery stage showing that the plaintiff was not the owner of the vessel at the time he insured the same with QBE. The learned Master ruled that the proposed amendment has no real prospect of success, albeit the fresh evidence discovered was before him.

[33] In ***Cook v News Group Newspapers Ltd*** [2002] EWHC 1070 (QB), LTL 21/6/2002, it was held that:

> *'The court would be more accommodating where the proposed amendments related to matters which had only emerged at a late stage with the discovery of evidence which previously had been genuinely unavailable. On the facts, permission was granted restricted to allegations genuinely unavailable. On the facts, permission was granted restricted to allegations genuinely supporting the central allegations'.*

[34] The modern approach is flexible, with amendments being granted in accordance with the justice of the case. There is no absolute rule of law or practice which precludes an amendment to rely on cause of action which has arisen after the commencement of the proceedings where otherwise the claim would fail (***Maridive and Oil Services (SAE) v CAN Insurance Co. (Europe) Ltd*** [2002] EWCA Civ 369, [2002] 2 Lloyd's Rep 9).

[35] QBE's amendments are raising affirmative and arguable defence based on law and facts. There was no evidence whatsoever before the learned Master to disprove the allegations of facts in the proposed amendment. Therefore, it was not open to the learned Master to hold that the proposed amendment has no real prospect of success. The defendant's proposed amendments have, in my opinion, real prospect of success if they are allowed to go to trial.

Ground 3-Mala fides

[36] The learned Master found that QBE acted in bad faith in relation to the proposed amendments on the basis that:

(a) the proposed amendments, particularly the affirmative defences, are not relevant to the commencement of the insurance, the payment of premium or the refusal by QBE to compensate the Plaintiff for his loss;

(b) there was no reason why the alleged misrepresentation and non-disclosure by the Plaintiff in relation to the ownership of the vessel was material to the risk that QBE undertook; and

(c) no evidence was adduced by QBE to demonstrate that the risk would have been different or the premium would have been more or less.

[37] The learned Master placed reliance on the decision in the case of **National Bank of Fiji v Naickar** [2013] FJCA 106; ABU00.2011 (8 October 2013), where the Defendant applied to amend his defence 14 years after the action was filed and eight years after filing the Defence, Fiji Court of Appeal viewed this conduct as unacceptable and said the application was made in bad faith.

[38] The facts in the present case are different from the facts in *Naickar* case is not relevant the present case.

[39] Mr. Ronal submits that the learned Master proceeded to deliberate on the issue of mala fides despite his finding that the issue of mala fides was never raised by the Plaintiff in his affidavit in opposition but was introduced through submission at the hearing and despite noting that the issue was raised 'at the eleventh hour'.

[40] There was no evidence before the learned Master to establish that QBE's conduct was fraudulent or overreach in making its application for amendment of the defence. The learned Master has decided on the issue of mala fides without any evidence adduced by the plaintiff. His finding on that issue cannot stand.

Ground 4-Not all amendments individually considered

[41] The fourth ground of appeal is that the learned Master did not rule/consider the proposed amendments individually/separately.

[42] I do not propose to discuss this issue, for the appellant succeeds on other grounds of appeal.

Conclusion

[43] The modern approach is flexible, with amendments being granted in accordance with the justice of the case. There is no absolute rule of law or practice which precludes an amendment to rely on defence which has arisen after the commencement of the proceedings where otherwise the defence would fail.

[44] The proposed amendments to the defence are related to matters which had only emerged at the discovery stage with the discovery of evidence which previously had been genuinely unavailable. There is nothing to show the matters alleged in the amendments are previously known to the defendant.

[45] The amendments are raising affirmative and arguable defence based on law and facts and they are relevant and necessary for the purpose of determining the real issue (liability issue) in controversy between the parties. They are required in the interest of justice. I am of opinion that the amendments have real prospect of success if allow to be put before trial. I would reject as baseless any allegation that the defendant's conduct was fraudulent or overreach in making its application for amendment.

[46] I would therefore hold that appellant succeed in the appeal. I allow the appeal and set aside the learned Master's decision refusing to grant leave to the appellant to amend its defence. I now grant leave to the appellant to amend the defence as proposed. Accordingly, the defendant will file and serve the amended defence and counterclaim (as proposed) in 21 days. The plaintiff will file and serve his amended reply and defence to the amended defence and counterclaim in 14 days thereafter.

Costs

[47] Normally, amendments are allowed with the party making the amendment being ordered to pay the costs of and arising from the amendments. A party who ought to have consented to proposed amendment was ordered to pay the costs of the application to amend, but the costs of and occasioned by the amendment themselves should still be paid.

[48] The plaintiff as a legal practitioner should have known the rule and principles applicable to amendments of pleading. The plaintiff ought to have consented to the amendments considering the nature and the circumstances under which the application for amendment was made. Instead, the plaintiff unreasonably refused to consent to the amendments. I therefore order the plaintiff to pay the costs of this

appeal, which I summarily assess at $1000.00. The costs is to be paid by the plaintiff to the defendant in 21 days from the date of this judgment.

Final Outcome

1. Appeal allowed.
2. Master's orders set aside.
3. Leave granted to defendant to amend the defence.
4. The defendant will file and serve its amended statement of defence and counterclaim (as proposed) in 21 days.
5. The plaintiff will file and serve his reply to the amended defence and defence to counterclaim in 21 days thereafter.
6. The plaintiff will pay $1000.00 as the costs of the appeal, which is summarily assessed, to the defendant in 21 days.
7. The matter will take its normal course. For that purpose the matter is adjourned before the Master for further direction at 8.30am on 15 March 2017.

Hjmajeer 18/1/17

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M H Mohamed Ajmeer

JUDGE

At Lautoka

18 January 2017

Solicitors:

Messrs Lowing & Associates for the plaintiff

Messrs Munro Leys Solicitors for the defendant