IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 188 of 2012

BETWEEN	:	**BEACHCOMBER ISLAND RESORT LIMITED** a limited liability company having its registered office at Lautoka **PLAINTIFF**
A N D	:	**INTERNATIONAL FREIGHT AND CLEARANCE SERVICES LIMITED** a limited liability company having its registered office at c/- Shyam Narayan & Co, 1st Floor, Crown Investments Building, Nadi **DEFENDANT**
A N D	:	**BRENDAN LUKE HANNON** shareholder/director of Beachcomber Island Resort Ltd; Fineline holdings Ltd and Anchorage Beach Resort, of Vuda, Lautoka. **1ST THIRD PARTY**
A N D	:	**TUBREN AIRFREIGHT CONSULTANTS** of Nayau Street, Samabula North, Suva. **2ND THIRD PARTY**
A N D	:	**FINELINE HOLDINGS LIMITED** a limited liability company having its registered office at 52 Narara Parade, Lautoka. **3RD THIRD PARTY**
Before	:	Master U.L. Mohamed Azhar
Counsels	:	Ms.V. Lidise for the plaintiff Mr. R.Kumar for the Defendant
Date of Ruling	:	20th April 2018

RULING

01. This is the summons filed by the defendant on 02.03.2017, pursuant to Order 20 rule 5 of the High Court and the inherent jurisdiction of the High Court, seeking leave to amend the paragraph 8 of its Statement of Defence and Counter Claim. The affidavit of the

Financial Controller, one Mr. Ifran Zoheb Ali Janab of the defendant was filed in support the summons. The summons seeks the following orders;

a. *The defendant be given leave to amend paragraph 8 of its statement of defence and counter claim as proposed, and*

b. *The cost of this application be paid by the plaintiff, the 1st and 3rd Third Parties on a client and solicitor indemnity basis.*

02. The 1st Third Party, who is the majority shareholder and the managing director of the plaintiff company, and the shareholder and the director of the 3rd Third Party, filed the affidavit in opposition to the proposed amendment. The defendant company then filed the affidavit of its same Financial Controller in reply to the said affidavit in opposition.

03. The plaintiff's claim against the defendant is based on the dishonoured cheque No. 000687 drawn on Westpac Bank Corporation for sum of $ 445,997.61 in favour of the plaintiff. The said cheque was issued for the amount allegedly paid by the plaintiff to the International Air Transport Association (IATA) at the request of the defendant, by way of telegraphic transfer for the credit of the defendant's account with IATA. On presentation, the cheque was dishonoured with the notion "R" which means 'Refer to drawer'. Therefore, the plaintiff moves for judgment against the defendant for the said amount together with the interest under the Law Reforms Miscellaneous Provisions (Death and Interest) Act and the cost on solicitor/client basis.

04. The defendant, upon service of the writ and before filling its defence, issued Third Party Notices on all the Third Parties added to this action and then filed a very lengthy statement of defence. The defendant, denying the allegation that, it requested the plaintiff to pay a sum of $ 445,997.61 to IATA, stated that, the 1st Third Party, being the director and the shareholder of the plaintiff company and the consultant of the defendant company, had made the payment through a 'systematic fraud'. The defendant then explained how the alleged 'systematic fraud' was committed by the 1st Third Party. Briefly, the defendant had a freight consultancy agreement with the 2nd Third Party at a fee of $ 1,265 per week. The 2nd Third Party then employed the 1st Third Party for this purpose under a work permit at the remuneration of $ 25,000 per annum to provide services to the defendant.

05. The defendant further states in its statement of defence that, apart from the said remuneration, the 1st Third Party was not supposed to carry out any other business in Fiji unless approved in accordance with the provisions of Exchange Control Act Cap 211. The 1st Third Party, given nature of service he provided to the defendant company, had his own office space at the premises of the defendant at Nadi Airport since 1996 till 2012, and had assumed the control of day to day operation of the defendant company. In addition, the 1st Third Party, as the consultant, had access to the pre-signed cash cheques of the defendant company that were made out due to the 24 hours operation of freight business, which required payment outside normal office hours. The defendant, denying any contractual relationship with the plaintiff and issuing the disputed cheque to the

plaintiff, went on to say that, the 1st Third Party, through his 'systematic fraud' directed the accounts clerk of the defendant company to prepare the said cash cheque in favour of the plaintiff. The defendant, in its counter claim, states that, the 1st Third Party through his 'systematic fraud' removed $ 12.735 Million from the defendant company and the plaintiff, being the vehicle for the said 'systematic fraud' unjustly enriched. Therefore, the defendant sought to strike out the claim of the plaintiff, whilst seeking special and general damages for the alleged 'systematic fraud' together with the interest and cost on a solicitor and client basis.

06. The plaintiff, 1st and 3rd Third Parties then filed an equally lengthy reply to the defence and denied the alleged 'systematic fraud' and the unjust enrichment. The 1st Third Party specifically stated that, as a result of the consultancy agreement, he and the defendant agreed that, he would receive a consultancy fee or commission of 40% for each and every job he secured for the defendant. In addition, the 1st Third Party made a counter claim of sum of $ 489,642.33 being the commission for the work and the income he generated for the defendant which the latter failed to pay. On the other hand, the defendant company denied the liability for the counter claim and reiterated what it stated in the statement of defence. The pleadings were then closed and the parties were directed to file their affidavits verifying the list of documents and complete the discoveries. It took unusual long time for them to complete these steps, and finally they were directed to finalize the Pre-Trial Conference Minutes on 08.10.2015. However, they could not finalize the same, even though the conference was convened before the court on 25.05.2015. This finally led the defendant company applying for leave to amend paragraph 8 of its statement of defence, which is now before the court for determination.

07. The Order 20 rule 5 of the High Court Rules provides for the court's power to grant leave to amend the pleadings. The defendant company filed its instant summons under this rule. The rule provides:

> *"Subject to Order 15, Rule 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."*

08. The above rule in its plain meaning gives a broad discretion to the court to allow amendment of pleading at any stage of proceedings, and such discretion should be exercised in accordance with the well-settled principles. **Lord Keith of Kinkel** delivering the opinions of the House of Lords in ***Ketteman and others v Hansel Properties Ltd*** *[1988] 1 All ER 38*, held at page 48 that:

> *"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".*

09. The court should be guided by its assessment of where justice lies when exercising this discretion in a given case. **Lord Griffiths,** in that above case, concurring with **Lord Keith of Kinkel,** held at page 62 that.

> *"Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so".*

10. **Sellers J** in ***Loutfi v. C Czarnikow, Ltd****[1952] 2 All ER* ***823*** emphasized that, in would be only in conformity with the well-established rules that the amendment of pleadings should be allowed. His Lordship reiterated at page 834 that:

> *"I think it would be only in conformity with well-established rules that I should allow that amendment because it is simply setting out in the pleadings that which has emerged in the course of the case as an issue between the parties".*

11. Though the court is given wide discretion to allow the amendment of pleadings at any stage of the proceedings, a clear difference, between allowing amendment to clarify the issues in dispute and those that permit a distinct defence altogether, must not be forgotten. It is not the practice invariably to allow a defence which is wholly different from that pleaded to be raised by amendment. The difference was emphasized by the House of Lords in ***Ketteman and others v Hansel Properties Ltd****(supra),* where **Lord Griffiths** stated at page 62 that:

> *"There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time".*

12. There are several authorities that set out the guiding principles on the question of amendment. **Jenkins L. J.** *in* ***R. L. Baker Ltd v Medway Building & Supplies Ltd*** *[1958] 3 All E.R. 540. P. 546).held that;*

> *I should next make some reference to the principle to be followed in granting or refusing leave to amend, and I start by saying that there is no doubt whatever that the granting or refusal of an application for such leave is eminently a matter for the discretion of the learned judge with which this court should not in ordinary circumstances interfere unless satisfied that the learned judge has applied a wrong principle or can be*

said to have reached a conclusion which would work a manifest injustice between the parties. Bearing that in mind, I will refer to some of the authorities read in the course of the very full argument on this matter. One begins with R.S.C., Ord.28, r.1, which is in these terms:

"The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

I repeat the second half of the rule "and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." I do not read the word "shall" there as making the remaining part of the rule obligatory in all circumstances, but there is no doubt whatever that it is a guiding principle of cardinal importance on this question that, generally speaking, all such amendments ought to be made "as may be necessary for the purpose of determining the real questions in controversy between the parties." (Underlining added).

13. The courts and the tribunals exist for the very purpose of deciding the rights of the parties in a given case. The duty that casted on them is to decide the matters in controversy between the parties. It, therefore, follows that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. **Bowen L.J.** in ***Cropper v. Smith****(1883)26 Ch. D. 700* stated at pages 710 and 711 that:

"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 otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, 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. Order XXVIII, rule 1, of the Rules of 1883, which follows previous legislation on the subject, says that, "All such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." 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".

14. The practice of Bramwell L.J., which His Lordship expressly mentioned in ***Tildesley v. Harper*** *(1878) 10 Ch. D. 393*, at pages 396 and 397, clearly sets the principle that can guide the court in exercising the discretion on amendment of pleading. His Lordship held that:

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

15. When exercising the discretion, the court is bound to look into the injury or the injustice that the proposed amendment may cause to the other party, irrespective of the delay that can be compensated through the appropriate cost. "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 by costs" (per Brett M.R.in ***Clarapede v. Commercial UnionAssociation*** *(1883) 32 WR 262, p263*). However, the overall assessment of where the justice lies should be guiding the court in exercising the discretion on amendment. Many and diverse factors to be considered in this regard, and it should be noted that, justice cannot always be measured in terms of money and the cost and the time of application too, be considered, the rule allows the application at any stage of the proceeding, because it is the discretion in any event. Allowing an amendment, before a trial begins is quite different from allowing it, at the end of the trial, to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence. **Lord Griffiths** in ***Ketteman and others v Hansel Properties Ltd(supra)*** held at page 62 that:

> *"Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently*

unsuccessful defendant an opportunity to renew the fight on an entirely different defence.

Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings".

16. As held by **Evershed M.R** in ***Hutchinson v Jauncey*** *(1950) 1 All E.R. 165 (C.A.),*that, in general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows an intention to vary such rights: (Also see: *Wilson v Dagnall* [1972] 1 Q.B. 509). However, if the relief sought will operate from the date of trial and onwards, the amendment, to include the new defence created by the new statute, should be granted. **Lord Denning MR,** upholding the decision of the lower court allowing the amendment based on the later amendment to the law, held in ***Application des Gaz SA v Falks Veritas Ltd*** *[1974] 3 All ER 51* at pages 55 and 56 that:

The first point taken by the Gaz company was that their claim for infringement of copyright arose in 1970 and 1971--long before we joined the common market. The writ was issued on 12 April 1972. The rights of the parties ought, they said, to be decided according to the law as it stood then; and not as altered by the Treaty of Rome, which did not become applicable here until 1 January 1973. The treaty, they said, ought not to be applied retrospectively so as to affect the rights of the parties in actions already begun before that date. I accept that proposition. In general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute, on its true intendment, shows an intention to vary such rights: see Hutchinson v Jauncey and Wilson v Dagnall. But in this case the plaintiffs, the Gaz company, claim an injunction. They seek to prevent the Veritas company in the future from making or selling the orange Veritas tins. If an injunction is granted, it will operate from the date of trial onwards. In my opinion that point--an injunction or not--will have to be decided according to the law as it stands at the date of the trial. Counsel for the Gaz company recognised this, but he urged that the amendment should await that time. It should not be allowed now.

There is a good deal to be said for this point of view. If the amendments are allowed, they are bound to give rise to much delay and expense. There will have to be a great deal of discovery--on the issues of 'abuse of dominant position' and 'concerted practice'. The trial will last a great deal longer, and so forth. I agree that this would be the result of the amendments. But, nevertheless, the Gaz company insist on their claim for an injunction. It is the most important part of their case. So long as they insist on it, I do not think we can refuse the amendments, provided always that they raise points which are fairly arguable. After all, if the Gaz company are abusing their dominant position--if they are acting in concert to prevent competition--contrary to community law, they ought not to be granted an injunction.

17. In ***Omar v Omar*** *[1995] 1 W.L.R.* 1428, **Jacob J** held that, the plaintiffs were entitled to use the disclosed documents to amend the pleadings in the existing tracing claim, particularly in view of the fact that they had a strong prima facie claim to trace and their purpose in using the disclosed documents was to support their claim and not to discover a cause of action. However, if the parties intend to use the material, obtained on discovery, and amend the pleading for a collateral or ulterior purpose, the amendment will not be allowed. In ***Mialano Assicuraniona Spa v Walbrook Insurance Co Ltd*** *[1994] 1 W.L.R 977,* the plaintiffs, who brought an action by specially endorsed writ, sought to amend their points of claim to incorporate matters revealed on discovery by the defendants. The Plaintiffs intended that the amended points of claim should be open to public inspection. The defendants resisted the application and applied for an injunction restraining the plaintiffs from showing any third party the amended points of claim. Refusing the application for injunction, Waller J held that;

"Unlike other pleadings a specially endorsed writ was a public document; that the parties had impliedly undertaken on discovery that material disclosed would not be used for a collateral or ulterior objective; that since the plaintiffs' purpose in seeking to amend the writ rather than issue a separate statement of claim was ulterior to the litigation in that it was clear that the third parties wanted the information in order to found their own claims against the defendants, the court would grant leave for the amendment to be made in a separate statement of claim which would not be publicly available; and that in those circumstances there was no need to grant the injunction sought by the defendants".

18. ***Perrin v Drennan and Another*** *[1991] F.S.R (Fleet Street Report) 81* is the case where the infringement of copyright was involved. In that case, an application was made by the plaintiff to amend its statement of claim to include allegations that the defendant had copied the products of third parties so as to raise similar facts upon which the plaintiff would wish to rely at trial. The defendants objected to these amendments on the ground of irrelevance even if true. They further argued that the amendments were in any event inadmissible at trial, were of little probative value. Therefore it should not be permitted in the court's discretion. **Justice Aldous** held that;

> *Leave would be given to make the amendments sought. The facts, if proved, could be relevant and admissible and the added burden placed on the defendants when weighed against the possible detriment to the plaintiff was not such as to require the court to disallow the amendments.*

19. **LORD BRANDON OF OAKBROOK,** in the above cited ***Ketteman and others v Hansel Properties Ltd(supra)*** having analyzed the authorities, summarized the proposition and stated at page 56 as follows:

> *The effect of these authorities can, I think, be summarised in the following four propositions. First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided. Second, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Third, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourth, there is no injustice to the other party if he can be compensated by appropriate orders as to costs.*

20. The Supreme Court Practice of 1999, under the heading **'General principles for grant of leave to amend'** at page 379, summarized the principles developed by the English courts on the amendment of pleadings. These principles have, frequently, been applied by the courts in Fiji in exercising the discretion on amendment of pleading (see: **National Bank of Fiji v Naicker [2013] FJCA 106; ABU0034.2011 (8 October 2013); Colonial National Bank v Naicker,**[2011] FJHC 250; HBC 294. 2003 (6 May 2011)).

21. The Fiji Court of Appeal in ***Reddy Construction Company Ltd v Pacific Gas Company Ltd*** *[1980] FJLawRp 3; [1980] 26 FLR 121 (27 June 1980)*, succinctly summarized the test applicable and held 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 contest 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 amendments will not be allowed which will work an injustice is also always looked at with care. So in many reported cases we see refusal to amend at a late stage particularly where a defence has been developed and it would be unfair to allow a ground to be changed".

22. Again in ***Sundar v Prasad*** *[1998] FJCA 19; Abu0022u.97s (15 May 1998)* the Fiji Court of Appeal further emphasized the test and stated how the balance to be made between the interest of the party seeking the amendment and the other side which incurs the cost. The Court unanimously held that:

Generally, it is in the best interest of the administration of justice that the pleadings in an action should state fully and accurately the factual basis 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 met, leave to amend may 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 chance 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.

23. The following principles emerge from the analysis of the rule and the above authorities, both foreign and local, on the amendment of pleading in a civil suit. However, it should be remembered that, these principles can only guide the court in exercising its vast discretion and cannot be taken as restricting or limiting the same.

a. The court has vast discretion to allow amendment of pleadings at any stage of proceedings and this discretion should be exercised in accordance with the well-settled principles. (*Ketteman and others v Hansel Properties Ltd(supra); Loutfi v. C Czarnikow, Ltd(supra).*

b. It should not give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence (*Ketteman and others v Hansel Properties Ltd(supra).*

c. There is a difference between allowing amendment to clarify the real issues in dispute and those that permit a distinct defence to be raised for the first time (*Ketteman and others v Hansel Properties Ltd(supra)).*

d. All such amendments ought to be made as may be necessary for the purpose of determining the real questions in controversy between the parties (*R. L. Baker Ltd v Medway Building & Supplies Ltd(supra)*).

e. Amendment of genuine mistake and negligent or careless omission, without any fraudulent intention, should be allowed if it can be done without injustice to the other party (*Cropper v. Smith(supra); Clarapede v. Commercial UnionAssociation(supra)).* There is no injustice if the other side can be compensated by costs (*Clarapede v. Commercial UnionAssociation(supra).* However, the justice cannot always be measured in terms of money and cost(*Ketteman and others v Hansel Properties Ltd(supra)*).

f. Amendment to include the new defences created by a new statute could be allowed (*Application des Gaz SA v Falks Veritas Ltd**(supra)***).

g. Amendment to include the materials obtained on discovery will be permitted. However, if it is for the purpose ulterior to the pursuit of the action, it should not be allowed (*Omar v Omar(supra); Mialano Assicuraniona Spa v Walbrook Insurance Co Ltd(supra)*).

h. The ultimate purpose is to do justice between the parties (*Ketteman and others v Hansel Properties Ltd(supra)*; *Reddy Construction Company Ltd v Pacific Gas Company Ltd*; *Sundar v Prasad(supra)*).

24. Bearing in mind the above principles, I now turn to discuss the application before the court in the instant case. As stated above, the defendant company seeks to amend only the paragraph 8 of its statement of defence. The original paragraphs reads;

> *"Apart from the remuneration that the 1st Third Party received from the 2nd Third Party under the said employment contract, as a non-resident the 1st Third Party was not supposed to carry out any other business in Fiji unless approved in accordance with the provisions of the Exchange Control Act Cap 211 of the Laws of Fiji or unless the 1st Third Party became a Fijian resident/citizen."*

25. The proposed amendment to the above paragraph is to add the phrase to include *Immigration Act Cap 88, Value Added Tax Decree 1991and the laws of Fiji* to the said

paragraph. The defendant has attached the proposed amendment which is highlighted below;

> *"Apart from the remuneration that the 1st Third Party received from the 2nd Third Party under the said employment contract, as a non-resident the 1st Third Party was not supposed to carry out any other business in Fiji unless approved in accordance with the provisions of the Exchange Control Act Cap 211,* ***Immigration Act Cap 88, Value Added Tax Decree 1991 and the Laws of Fiji*** *or unless the 1st Third Party became a Fijian resident/citizen."*

26. The defendant's counsel contended that, it is simply to add those two legislations and the plaintiff and the third partied do not even to answer the same, since they already denied the original paragraph 8. On the other hand, vehemently objecting the proposed amendment, the counsel for the plaintiff and the third parties argued that, it intends to create new defence of illegality of the commission owing to the 1st Third Party from the defendant company. Based on the pleadings before the court, there are three issues to be decided between the parties in this matter. They are (a) the plaintiff's claim against the defendant on the dishonoured cheque, (b) the counter claim by the defendant for the 'systematic fraud' committed by the 1st Third Party and the associated unjust enrichment by the plaintiff as alleged by the defendant and (c) the counter claim of the 1st Third Party for the unpaid commission for the business he generated for the defendant.

27. The 1st third party clearly pleaded that, he provided the service to the defendant on the agreed 40% commission on the business generated by him for the defendant company. The defendant company too admitted that, there was a consultancy agreement between the defendant and the 2nd Third Party whereby the 1st Third Party was employed as the consultant for the defendant company. It is also admitted by the parties that, the 1st Third Party was working at the office of the defendant company and even he worked outside the normal office hours, as the nature of his service warranted him to do so. Therefore, the remuneration and the perks, to which the 1st Third Party is entitled, to be decided based the terms and the conditions of the consultancy agreement between the defendant and the 2nd Third Party and on its interpretation by the court after trial.

28. There are three issues involved in relation to the defence taken by the defendant in paragraph 8 of its statement of defence. The first is whether the 1st Third Party carried out any other business outside the consultancy agreement between the defendant and the 2nd Third Party. The second is whether the service, provided by the 1st Third Party to the defendant on the 40% commission as claimed by the him, is falling outside the consultancy agreement or not. The third is whether 1st Third Party has violated the provisions of ***Immigration Act Cap 88, Value Added Tax Decree 1991 and the Laws of Fiji***, by claiming the commission apart from the remuneration he received from the 2nd Third Party. The first and second questions should be decided based on the terms and the conditions of the consultancy agreement and the evidence that may be given at the trial on the nature of the services provided by the 1st Third Party to the defendant. The third issue relates to the conducts of the 1st Third Party, who is permitted to enter and remain in

Fiji as a Non- Resident. The Immigration Act provides for the matter related to immigration, as clearly stated in its long title. If the conduct of anyone, who is permitted to the land, is contrary to the provisions of Immigration Act, it should fall under the one or more of the category provided under section 19, which provides for the offences that may be committed under that Act. If the 1st Third Party had committed any such offence, or violated any of the conditions on which he was granted permission to enter and remain in Fiji, then he must be dealt with accordingly. That is to say, the respective authority, which has expertise and experience in investigating those breaches of laws, should take action on him, and if necessary, he should be charged for any such offence.

29. Likewise, ***Value Added Tax Act 1991*** provides for the procedure for the administration of value added tax and the matters connected therewith. It specifically provides, in Part XII, for the offences related to the administration of VAT. Had the 1st Third Party violated any of the provisions, it should be an offence falling under the relevant section of Part XII and the respective authority should take cognizance of it. The violation of these legislations by the 1st Third Party is nothing to do with the alleged 'systematic fraud' which is the one of the issues between the parties. Therefore, it seems from the proposed amendment that, the purpose is ulterior to the pursuit of this action. The court held in ***Mialano Assicuraniona Spa v Walbrook Insurance Co Ltd(supra)*** that, any amendment with such motive should not be allowed.

30. The sole defence taken by defendant, throughout its statement of defence and the defence to the counter claim by the 1st Third Party, is the alleged 'systematic fraud' committed by the 1st Third Party and associated 'unjust enrichment' by the Plaintiff. Only after 3 years of closure of pleadings, the defendant taken up this new defence of alleged violation of ***Immigration Act Cap 88, Value Added Tax Decree 1991 and the Laws of Fiji*** by the 1st Third Party. This is completely new defence different from the real issues between the parties as discussed above. It is a guiding principle of cardinal importance that, all such amendments ought to be made "as may be necessary for the purpose of determining the real questions in controversy between the parties." The question whether the 1st Third Party has violated the ***Immigration Act Cap 88, Value Added Tax Decree 1991 and the Laws of Fiji*** is not the real issue between the parties. If the defendant has any information as to the alleged breach of laws by the 1st Third Party as a Non- Resident, who was allowed to enter and remain within Fiji, it can lodge the complaint to the relevant authority. In fact, the counsel for the 1st Third Party submitted during the hearing of this summons that, the office of the plaintiff and the 1st third party was investigated by some authorities based on the complaint of the defendant and thereafter the defendant filed this summons for amendment. It transpires from the said submission that, the defendant tries to amend the defence after the authority could not find anything to charge the 1st Third Party for the alleged violation of ***Immigration Act Cap 88, Value Added Tax Decree 1991 and the Laws of Fiji.***

31. Even the defendant wants to take up the defence of legality of the commission, which was claimed by the 1st third party, it can do so within the wording of original paragraph 8 of its statement of defence. There is no necessity to include the ***Immigration Act Cap 88, Value Added Tax Decree 1991 and the Laws of Fiji*** which mainly provide for criminal

sanction for breach of their provisions. In fact, bringing these additional statutes to the defence will definitely jeopardize the rights of the 1st third party under the consultancy agreement between the parties, which they had been carrying for 06 years since 1996 till the dispute arose between them. Furthermore, the proposed amendment will deviate the attention of the court from the real issues between the parties and will require for an investigation into an alleged offence under both statutes.

32. The above discussion reveals that, the settled principles, on granting leave to amend the pleadings do not support the exercise of court's discretion in favour of the defendant in this case. The proposed amendment is not only irrelevant to the real issues between the parties, but also prejudices the 1st third party. Thus, the proposed amendment should not be allowed. Furthermore, there has been undue delay on part of the defendant in finalizing the Pre-Trial Conference Minutes, though the court presided over the said conference and directed the parties on the proposed agreed facts and agreed issues to be tried. This delay must be compensated through an appropriate sum of cost payable to the 1st and 2nd Third Parties and the Plaintiff.

33. In result, the following orders are made;

a. The summons filed by the defendant on 02.03.2017, seeking leave to amend the statement of defence and counter claim, is dismissed,

b. The defendant to pay a summarily assessed cost of $ 500 to the Plaintiff, 1st and 2nd Third Parties within 14 days, and

c. The parties to finalize the Pre-Trial Conference Minutes within 14 days.

HIGH COURT OF FIJI
LAUTOKA

U. L. Mohamed Azhar
Master of the High Court

At Lautoka
20/04/2018