

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 418 of 2007

BETWEEN : COTEBA INTERNATIONAL having its registered office at 2 Avenue Francois Mitterand 93210
La Plaine Saint Denis, France.

PLAINTIFF

AND : NATADOLA BAY RESORT LIMITED a limited liability company having its registered office
c/- Deloitte Touche Tohmatsu, Level 10, FNPF Place, 343 Victoria Parade, Suva in Fiji.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSEL: Ms. Low Pulekeria - for the Plaintiff
Mr. Rudra Nand with Ms. Choo - for the Defendant

Date of Ruling: 24th April, 2018

RULING

*[Inter-Parte Motion by the Plaintiff seeking an order for Substitution of the Plaintiff
Coteba International pursuant to Order 15 Rule 8 (2) and (4),
Order 15 Rule 9 (4) of the High Court Rules 1988]*

INTRODUCTION

1. The Plaintiff by its Motion filed on 28th June, 2017 sought for the following Orders from this Court:
 - (a) *That the Plaintiff, Coteba International, be substituted with Artelia International being the assignee of the plaintiff's interest and having its registered office at 2 Avenue Francois Mitterrand, 93200 La Plaine Saint Denis, France.*
 - (b) *That all pleadings/documents filed in the course of this proceeding before the granting of Order No.1 above, shall have effect in relation to the new Plaintiff (Artelia International) as they had in relation to the old (Coteba International); and*
 - (c) *That this cause of action be continued from the last stage of these proceedings following the substitution sought in Orders No.1 and 2 above.*

2. This application is made pursuant to *Order 15 Rule 8 (2) and (4), Order 15 Rule 9 (4) of the High Court Rules, 1988*.
3. The Plaintiff *relies* on the Affidavit of ANTOINE PIGOT filed in support of the Motion and deposed on 19th June, 2017.
4. This application is vigorously opposed by the Defendant and accordingly filed an Affidavit in Response.

THE LAW

5. *Order 15 Rule 8 (2) and (4) of the High Court Rules, 1988* provides as follows-

(2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.

(4) The person on whose application an order is made under this rule must procure the order to be noted in the cause book, and after the order has been so noted that person must, unless the Court otherwise directs, serve the order on every other person who is a party to the cause or matter or who becomes or ceases to be a party by virtue of the order and serve with the order on any person who becomes a defendant a copy of the writ or originating summons by which the cause or matter was begun and form of acknowledgment of service in Form 2 in Appendix A.

6. *Order 15 Rule 9 (4) of the High Court Rules, 1988* provides as follows-

(4) Where by an order under rule 6 or 8 a person is to be added as a party or is to be made a party in substitution for some other party, that person shall not become a party until-

(a) where the order is made under rule 6, the writ has been amended in relation to him under this rule and (if he is a defendant) has been served on him, or

(b) where the order is made under rule 8, the order has been served on him under rule 8(4) or, if the order is not required to be served on him, the order has been noted in the course book;

and where by virtue of the foregoing provision a person becomes a party in substitution for some other party, all things done in the course of the proceedings before the making of the order shall have effect in relation to the new party as they had in relation to the old, except that acknowledgment of service by the old party shall not dispense with acknowledgment of service by the new.

BACKGROUND OF THE CASE

7. The Plaintiff instituted proceedings against the Respondent alleging breach of contract in that alleged failure to make payment for the services rendered to the Defendant pursuant to the Construction Management Contract AND seeks judgment in the sum of \$2,691,625.00 being the alleged sum owed under the Contract.

8. The **Defendant** on the other hand in its **defence** has filed a **counter-claim** against the Plaintiff alleging **breach of the written terms of the contract**, breaches as stipulated in the Statement lit Defence.
9. The **Defendant** seeks judgment for the loss and damages arising out of the breaches, in its counter-claim, with particulars of the special damages to be provided prior to or at Trial.

PLAINTIFF'S CASE

10. In summary, the **Plaintiff's** contention are as follows-
 - a. In 2010, there was a merger of the current Plaintiff with SOGREAH which became full owned subsidiaries of Artelia;
 - b. On 22 November 2011, the current Plaintiff entered into a Partial Asset Contribution with a company named, GESFIT;
 - c. The purpose of the said contribution was to separate the operation of the business carried out in France from the business carried out internationally;
 - d. Accordingly the Contribution effected the following:
 - i. The transfer of assets and liabilities of the current Plaintiff pertaining to the international business unit only to GESFIT;
 - ii. COTEBA to retain its building and industrial facilities in France
 - e. Following the Contribution, the current Plaintiff and GESFIT changes its company names to reflect the natures of its operations as such:
 - i. COTEBA renamed as Artelia Batiment and Industrie;
 - ii. GESFIT then changed its name to Artelia International

DEFENDANT'S CASE

11. In summary, the **Defendant's** contention is otherwise and stated as follows-
 - a. The **Defendant** raised a **preliminary point of objection** against the Affidavit of Mr Pigot. The Defendant is of the view that the said Affidavit is deemed irregular for reason being that the said Affidavit does not annex any authority from the current Plaintiff allowing Mr. Pigot to depose this Affidavit save as to bare averments of Mr Pigot purporting to hold such authority.
 - b. *Order 41 Rule 11 of the High Court Rules* specifically places emphasis on this very condition that any document intended to be used in conjunction with an Affidavit must be **exhibited to the Affidavit**. He referred Court to the *case of Devi v Pacific Transport Ltd [2017] FJHC 124; HBC130.2016* (17 February 2017) wherein similar sentiments were raised and it was specifically held by the court that "In terms of *Order 41, rule 11, of the High Court Rules*, the deponent is required to annex the letter of authority to the affidavit". Hence the Affidavit was accordingly struck out by the court.
 - c. This application for substitution is highly contentious in nature and the Affidavit materials have been deposed by an individual purporting to be the Managing Director of an entity that has yet not been substituted as a

- party to the current proceedings. As such the locus standi becomes one of cardinal importance and it is submitted that the proposed party has no locus standi to bring an action for substitution.
- d. The criteria upon which substitution will be granted under *Order 15 Rule 8 (2)* provides as follows: "At any stage of the proceedings in any cause or matter the interest or liability of any party is *Assigned, Transmitted to; or Devolves upon some other person. The court may, if it thinks it is necessary...order that other person to be made a party to the cause...as if he had been substituted for the first mentioned party.*
- e. The Defendant submitted that the application for substitution be struck out.

ANALYSIS and DETERMINATION

12. The issue for this Court to determine is "*Whether Coteba International can be substituted by its assignee, Artelia International?*"
13. The Defendant objected to the Plaintiff's application for substitution on these grounds-
- (i) *That the Affidavit of Mr. Pigot is deemed irregular since the Affidavit does not annex any authority from the current Plaintiff, thus the deponent having no authority as such (O.41r. 11 refers);*
- (ii) *The Deponent of Affidavit in Support of the Plaintiff's application has not established the nexus between the current Plaintiff in this proceedings and the intended new Plaintiff, Artelia International;*
- (ii) *There is no documentary evidence on the merger and assignment;*
- (iv) *That the Plaintiff's application pursuant to Order 15 Rule 8(2) fails on all the three limb test whether the Plaintiff's "interest and liability" is-*
1. *Assigned; or*
2. *Transmitted to; or*
3. *Devolves upon some other person.*
- (v) *That substitution should not be allowed after the expiration of the limitation period.*
14. The Defendant further stated that the Plaintiff ceased to exist in 2010 by virtue of the merger of its operation, and yet substitution is sought some 7 years later and is subject to the provisions of the **Limitations Act**. Therefore, substitution should not be allowed citing *Order 15 Rules 6 (5) and (6)*.
15. However, the Plaintiff submitted that *Order 15 Rule 8 of the High Court Rules, 1988* allows for change of parties by reason of **assignment of interests or liabilities** in an existing claim/liability to which it has succeeded and also by a Company changing its names to **Artelia International**.
16. The Plaintiff's Motion seeking an Order for the substitution of *Coteba International* with *Artelia International* is made in support of the Affidavit deposed by Antoine Pigot. The substitution Order is sought pursuant to *Order 15 Rule 8(2) and (4) and Order 15 Rule 9(4) of the High Court Rules, 1988*.

Affidavit in Support of Antoine Pigot- Order 41 Rule 11

17. Firstly, Antoine Pigot has deposed the Affidavit for the Plaintiff. He derives his authority to depose this affidavit in his capacity as the **Managing Director** of *Artelia International*, the intended new Plaintiff in the current proceedings. This fact is evident and has been established by the Plaintiff in his annexure "Extract from the Trade and Companies register" marked "EL 1" within the Affidavit in Support. For clarity purposes, Entity is identified as "Artelia International" and Pigot Antoine as the "Managing Director". Therefore, Antoine Pigot in his capacity as the **Managing Director of Artelia International** is not required to obtain and annex any **authority** to his Affidavit in Support of the current application.

Assignment of Interests or liabilities and Merger

18. Secondly, the Plaintiff's application is made pursuant to *Order 15 Rule 8* and the substitution is sought in terms of *Order 15 Rule 8 (2) and (4) and Order 15 Rule 9 (4) of the High Court Rules, 1988 which provides as follows-*

Rule 8 (2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.

Rule 8 (4) The person on whose application an order is made under this rule must procure the order to be noted in the cause book, and after the order has been so noted that person must, unless the Court otherwise directs, serve the order on every other person who is a party to the cause or matter or who becomes or ceases to be a party by virtue of the order and serve with the order on any person who becomes a defendant a copy of the writ or originating summons by which the cause or matter was begun and form of acknowledgment of service in Form 2 in Appendix A.

Rule 9 (4) (4) Where by an order under rule 6 or 8 a person is to be added as a party or is to be made a party in substitution for some other party, that person shall not become a party until-

(a) where the order is made under rule 6, the writ has been amended in relation to him under this rule and (if he is a defendant) has been served on him, or

(b) where the order is made under rule 8, the order has been served on him under rule 8(4) or, if the order is not required to be served on him, the order has been noted in the course book;

and where by virtue of the foregoing provision a person becomes a party in substitution for some other party, all things done in the course of the proceedings before the making of the order shall have effect in relation to the new party as they had in relation to the old, except that acknowledgment of service by the old party shall not dispense with acknowledgment of service by the new. (Underline for emphasis)

19. In terms of *Order 15 Rule 8 (2)* as mentioned hereinabove, there was a merger of the current Plaintiff Coteba International with SOGREAH which became the fully owned subsidiaries of Artelia in 2010. On 22nd November, 2011, the current Plaintiff entered into a Partial Asset Contribution with GESFIT. The effect of this contribution was that COTEBA retained its building and industrial facilities in France whilst the transfer of assets and liabilities of the current Plaintiff COTEBA International of the international business unit only to GESFIT. Reference is also made to annexure "EL1" of the Plaintiff's affidavit which confirms that Antoine Pigot is the Managing Director of the Company.

20. Following the effect of the above contribution, the current Plaintiff and GESFIT changed its Company name to reflect the nature of its operations resulting in GESFIT then its name to ARTELIA INTERNATIONAL.
21. Therefore, from above, it is clear that the eventual **assignment of interests or liabilities in the existing claim/liability passed on** to the Company succeeding and also resulted in the change of its name to ARTELIA INTERNATIONAL.
22. I find for the above explanation and taking into consideration the Plaintiff's submissions that in terms of *Order 15 Rule 8 of the High Court Rules, 1988*, the law allows for the **change of the Plaintiff's name** to ARTELIA INTERNATIONAL by reason of **assignment of its interests and liabilities** in the existing or current claim/liability action accordingly. To be more precise and specific, *Order 15 Rule 8(2)* states as follows-

"(2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.

Reference is made to the Supreme Court Practice 1999 Volume 1 at page 233 provides the effect of *Order 15 Rule 7* which is equivalent to *Order 15 Rule 8 of the Fiji High Court Rules, 1988* and provides as follows-

"Firstly, the Supreme Court Practice 1999 Volume 1 ("*the White Book*") at page 233 provides the effect of rule Order 15 Rule 7 which is equivalent to Order 15 Rule 8 of the Fiji High Court Rule 1988. It states as follows:

"Effect of Rule- This rule does not alter the law as regards the survival of causes of action, but provides the procedure for reconstituting an action, where this is necessary and possible, in the event of certain changes affected a part or the interest or liability of a party". The changes dealt with by this Order are:

- (1) The death of a party;*
- (2) The bankruptcy of party;*
- (3) The assignment of the interest or liability of a party;*
- (4) The transmission of the interest or liability of a party; and*
- (5) The devolution of the interest or liability of a party"*

23. Further, the **assignment of the Plaintiff's interest to Artelia International is absolute** and the **Defendant** in the current action has been notified of the **assignment** and received the **notice of the assignment** in terms of *Order 8 Rule 4* accordingly.

Reference is made to *Section 113(1) of the Property Law Act* that deals with the assignment of debts and choses in action and states as follows-

"113.-(1) Any absolute assignment by writing under the hand of the assignor not purporting, to be by way of charge only)of any debt or other legal chose in action, of which express notice in writing has been given to the debtor trustee, or other person, from whom the assignor would have been entitled to receive or claim that debt or chose in action, is effectual in law (subject to equities having priority over the right of the assignee), to pass and transfer from the date of the notice -

- (a) the legal right to that debt or chose in action;*

(b) *all legal and other remedies for the debt or chose in action; and*

(c) *the power to give a good discharge for the debt or chose in action, without the concurrence of the assignor.*

24. Upon this assignment there is no new **cause of action** which has set in or is being sought for by the Plaintiff in the existing action. What is sought for by the Plaintiff herein is that the existing party or Plaintiff, Coteba International be substituted by the assignee Artelia International who has now succeeded and been assigned with the interests and liabilities of the current Plaintiff.
25. Accordingly, I find that upon substitution only the identity of the party and/or Plaintiff will change to Artelia International but the nature of the existing claim does not change and that there will not be any amendments sought by the substituted party to the current substantive claim in one way or other once substitution is granted. The matter needs to be continued from where it was left with the substitution granted accordingly.

Limitation Period

26. According to the Defendant, the general rule is that additions and substitution should not be allowed after the expiration of the limitation period, but the exception are specified very strictly in Order 15 Rule 6(5) and Rule 6(6). He added that the proposed Plaintiff fails to demonstrate that it fits in any of the strict four criterion under the provisions of Order 15 Rule (6). The relevant provisions provides as follows-

"(5) No person shall be added or substituted as a party after the expiry of any relevant period of limitation unless either-

(a) the relevant period was current at the date when proceedings were commenced and it is necessary for the determination of the action that the new party should be added, or substituted, or

(b) the relevant period arises under the provisions of subparagraph (i) of the proviso to paragraph 4(1)(d) of the Limitation Act and the Court directs that those provisions should not apply to the action by or against the new party. In this paragraph "any relevant period of limitation" means a time limit under the Limitation Act. (Cap. 35)

(6) The addition or substitution of a new party shall be treated as necessary for the purposes of paragraph (5) (a) if, and only if, the Court is satisfied that-

(a) the new party is a necessary party to the action in that property is vested in him at law or in equity and the plaintiff's claim in respect of an equitable interest in that property is liable to be defeated unless the new party is joined, or

(b) the relevant cause of action is vested in the new party and the plaintiff jointly but not severally."

(Underline for emphasis)

27. The initial action was commenced by Coteba International on 10th September, 2007. Taking into consideration the abovementioned provisions of the law to the current substitution application, I find that **Artelia International** should be substituted in place of **Coteba International** since the relevant

period was current at the date when the proceedings were commenced and it is necessary for the determination of the action that the new party Artelia International should be substituted accordingly. The expiry of any relevant period of limitation does not apply in the current case for substitution. Further, substitution confirms that no new cause of action is cited in the application by the Plaintiff.

28. Taking into consideration, the written submissions of the parties to this proceedings and the oral arguments and submissions together with the facts and laws applicable to the current case, I accede to the Plaintiff's application for substitution as sought in their application and accordingly make the order for substitution of Artelia International in place of Coteba International.
29. Further I grant costs against the Defendant summarily assessed at \$650 to be paid within 14 days' time frame.
30. Following are the Final Orders of this Court:

FINAL ORDERS

- a. The Plaintiff's application seeking substitution of Coteba International with Artelia International succeeds.
- b. That Artelia International to be substituted in place of the current Plaintiff Coteba International accordingly.
- c. The matter is adjourned for further directions.
- d. Each party to bear their own costs at the discretion of this Court;
- e. Orders accordingly.

Dated at Suva this 24th Day of April, 2018



Master
VISHWA DATT SHARMA

cc: Howards Lawyers, Suva
R. Patel Lawyers, Suva