

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

**CIVIL ACTION NO. HBC 313 OF 2005**

**BETWEEN** : **NATALIE KATZMANN** formerly of Harvester Road, Vitogo, Lautoka, but now of 74 Adelaide Street, Oxley Park NSW 2760, Australia, Assistant Manager.

**PLAINTIFF**

**AND** : **BARSTOCK INVESTMENTS (FIJI) LIMITED** a limited liability company having its registered office at Vuda Point, Lautoka.

**DEFENDANT**

**Appearances** : Ms V. Lidise for the plaintiff  
Mr R. Singh for the defendant

**Date of Hearing** : 6 March 2019

**Date of Oral Ruling** : 6 March 2019

**Date of Written Reason:** 13 March 2019

## **R U L I N G**

[Written reasons for ruling on amendment of defence]

### **Introduction**

[01] On 6 March 2019, I, after hearing both parties, announced that I would grant to the defendant leave to amend their statement of defence with the costs of \$1,500.00 payable to the plaintiff by the defendant within 21 days. These are my written reasons for doing so.

[02] This is an application to amend the statement of defence.

[03] By summons for leave to amend statement of defence with a supporting affidavit of James Rankin Dunn, the director of the defendant sworn on 20 February 2019

and filed on 21 February 2019 (*the application*), the defendant seeks the following orders:

1. *The defendant be at liberty to amend its Statement of Defence in this action by altering the same in the manner shown in red on the copy thereof delivered herewith;*
2. *The costs of this application and of the amendments consequential thereon may be costs in the action;*
3. *Such other or further orders as the Honourable Court deems fit and just.*

[04] The application is made pursuant to Order 20, Rules 5 and 7 of the High Court Rules 1988, as amended (*HCR*) and the inherent jurisdiction of the Court.

[05] The plaintiff objects to this application. She has filed an affidavit of her husband, Habibul Rahiman sworn on 5 March 2019 in opposition.

[06] The defendant filed the application on 21 February and the hearing on the application came up before yesterday (6 March 2019), when counsel appearing for the plaintiff sought leave to file an affidavit in opposition in the course of the day as the plaintiff's husband is coming to Fiji from Australia. This application was not objected to by the defendant. I accordingly allowed the plaintiff to file and serve her affidavit in opposition with an order that the defendant may file and serve an affidavit in reply, if need be. In compliance with the direction the plaintiff filed her husband's affidavit in opposition by 12 noon yesterday. The defendant opted not to file an affidavit in reply.

[07] At the hearing, the parties orally argued the matter and only the plaintiff tendered written submission.

### **Proposed amendment**

[08] The application seeks to amend the defence to further amended statement of claim. The defendant wishes to amend the defence as follows [para 14 and 15 of the proposed amendment, which is underlined in red]:

“ ...

14. Further or alternatively, the matter complained of in the Further Amended Statement of Claim were caused or contributed to by the Plaintiff's negligence.

*Particulars of Plaintiff's Negligence*

*If the plaintiff swallowed several mouthfuls of "Unique Pine" cleaning liquid or some other cleaning agent or liquid (not water) stored in a "Fiji Water" bottle (which is denied), she was negligent in –*

- (a) Failing to immediately spit out the cleaning agent or liquid;*
  - (b) Swallowing up to four mouthfuls of the cleaning agent or liquid despite its chemical taste;*
  - (c) Swallowing up to four mouthfuls of the cleaning agent or liquid despite noticing a burning sensation in her mouth immediately on drinking the cleaning agent or liquid.*
15. Further or alternatively, if the plaintiff swallowed several mouthfuls of "Unique Pine" cleaning liquid or some other cleaning agent or liquid (not water) stored in a "Fiji Water" bottle (which is denied), the Plaintiff –
- (a) upon tasting the cleaning agent or liquid; and/or*
  - (b) upon noticing a burning sensation in her mouth immediately on drinking the cleaning agent or liquid*

*knew or ought to have known that swallowing several mouthfuls of the cleaning liquid or agent involved a risk of inquiry. The Plaintiff, in swallowing several mouthfuls of the cleaning agent or liquid, impliedly consented to running that risk.*

*...”*

**Background**

[09] This action was commenced by a writ of summons and statement of claim on 26 October 2005. The current statement of claim, (which is the second amended statement of claim filed by the plaintiff on 16 February 2012), alleges that the plaintiff swallowed several mouthfuls of "Unique Pine" cleaning liquid or some other cleaning agent or liquid while she was a guest at the defendant's resort on or about 18 January 2005.

[10] The plaintiff filed an affidavit verifying list of documents on 16 September 2008 ("AVLD"). In the AVLD, the plaintiff listed a medical report by Dr. Christopher

Pokorny dated 23 March 2005, which states that she swallowed four mouthfuls of cleaning agent or liquid.

[11] This action has been fixed for trial on 11-13, 15 and 20 March 2019.

[12] The plaintiff objects to the proposed amendment on the ground that it has emerged on the verge of the trial, just 5 days ahead of the trial and that the plaintiff will be prejudiced if the amendment is allowed at this stage.

### Legal framework

[13] Amendment of writ or pleading may be amended with leave of the court at any stage of the proceedings. The HCR, O 20, R 5 states:

*“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 or her writ or any party to amend his or her pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct. (Emphasis provided)*

*(2) Where an application to the Court for leave to make the 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 sought to be corrected was a genuine mistake and was not misleading 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 sued.*

*(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."*

[14] The HCR, O 20, R 7, provides:

*"Amendment of certain other documents (O.20, r.7)*

*7 (1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.*

*(2) This rule shall not have effect in relation to a judgment or order."*

### **Test to be applied**

[15] Tikaram, JA in *Peter Sujendra Sundar & Anor v Chandrika Prasad* [1997] ABU 22/97 (apf HBC 233/93) Decision 10 November 1997 at 9, held that:

*"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 the test is met, leave to amend may be given even at a very late stage of the trial...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 expeditious conduct of trials. When leave to amend is granted, the party seeking the amendment must bear the costs of the party wasted, as a result of it"*

### **Discussion**

[16] The court has the discretionary power to grant to any party leave to amend his or her pleading at any stage of the proceedings on such terms as to costs or otherwise as may be just. Such power is conferred on the court by

the HCR, O 20, R 5. The phrase ‘at any stage of the proceedings’ in Rule 5 covers ‘at any stage of the proceedings before judgment’ (see *Fiji Electricity Authority v Suva City Council* [2000] 1 FLR 114; HBC 901/84S (5 August 1994, per Pathik, J))

- [17] The test to be applied, as case authorities suggest, in an application for amendment of pleadings is whether the amendment as proposed is necessary for the determination of the real controversy between the parties and does not result in injustice to other parties and 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 0022u.97s (15 May 1998)).
- [18] The defendant’s application to amend its defence has emerged just 3 weeks ahead of the trial date, which is 11 March 2019. As I said, the proposed amendment seeks to include alternative defence of contributory negligence and/or voluntary assumption of risk.
- [19] The proposed amendment arises out of the pleadings. In the amended statement of claim, the plaintiff states that she swallowed four mouthfuls of ‘Unique Pine’ cleaning liquid stored in a ‘Fiji Water’ bottle. It is because of this pleading the defendant intends to amend its defence so as to include alternative defence of contributory negligence and/or voluntary assumption of risk relating to the plaintiff swallowing up to four mouthfuls of the cleaning agent or liquid despite its chemical taste.
- [20] The application to amend the defence is objected to on the basis that: it has come up five days ahead of trial and if the amendment is allowed and trial is adjourned that will prejudice plaintiff as the plaintiff and her witnesses are travelling from Australia and their flight and accommodation have been booked. Furthermore, the defendant knew the fact that the plaintiff had swallowed four mouthful of ‘Unique Pine’ stored in a Fiji Water bottle right from the time when the amended statement of claim filed on 26 August 2011.
- [21] Mr Singh of counsel for the defendant submits that the defendant does not intend to delay the proceedings and the amendment sought can be done without the trial being adjourned. He relies on the case authority of *Lami Investments Ltd v Kelton Investments Ltd* [2016] FJCA 10; ABU60.2013 (26

February 2016), where Fiji Court of Appeal (Hon. Justice Calanchini, P with the concurrence of other two justices) held [at paragraph 25 and 26]:

*“Irrelevance of the Appellant’s Motive to delay the trial*

[25] *Thus, whether the Appellant’s motive was to delay the trial unnecessarily is rendered irrelevant. As Lord Devlin in a celebrated phrase once said “Even the devil knoweth not the mind of man” and the present case defies any motive investigation for the Appellant’s simple case in seeking the amendment in question was that, in its initial statement of defence, it had made “a genuine mistake.” As reflected earlier by me, whether it was so or not would be a matter that could be tested at the trial.*

*Delay could have been compensated by an appropriate order for costs*

[26] *Procrastination no doubt is not only the thief of time but it can also affect litigation. Then there is the adage that “justice delayed is justice denied.” On the other hand justice hurried would not be justice at all. As I have said earlier, whether on account of a ‘mistake’ or not, whether there was no explanation as to when the mistake was discovered or not, the overall consideration ought to be the quest to do justice between the parties, that is, to determine “the real dispute or the real question of controversy between the parties.”*

[22] It will be noted that as the Court of Appeal said in *Lami Investment Ltd* (above) the motive to delay the trial unnecessarily is an irrelevant consideration in an application to amend the pleading and that the overall consideration ought to be the quest to do justice between the parties, that is, to determine the real dispute or the real question of controversy between the parties and not whether on account of mistake or not, whether there was no explanation as to when the mistake was discovered or not.

[23] I do not find that the application to amend the defence had been made with a view to delay the proceedings that the proposed amendment arises for the pleadings. I also find that the proposed amendment is necessary in order to determine the real controversy between the parties.

[24] The limitation issue does not arise here as the application seeks to amend the defence only and not to introduce a new case by way of counterclaim.

### **Conclusion**

[25] Having considered the application, the affidavit evidence adduced by the parties and the submissions advanced by counsel, I conclude that an application for amendment of pleadings can be made at any stage of the proceedings even after the commencement of the proceedings (trial) before judgment without an explanation for the delay. The proposed amendment does not introduce a new case/defence. It arises out of the pleadings. The court has the discretion to grant leave to amend the pleadings at any stage of the proceedings in the interest of justice. In my opinion, the proposed amendment is necessary in order to determine the real controversy between the parties. The issue of prejudice would not arise as the amendment could be made without upsetting the trial dates. I would, therefore, grant leave to amend the statement of defence as proposed. Accordingly, the defendant will file and serve its amended statement of defence as proposed on the plaintiff by 7 March 2019 and the plaintiff may file and serve a reply by 8 March 2019, if need be. There will be no change in the trial dates.

### **Cost**

[26] When leave to amend is granted, the party seeking the amendment must bear the costs of the party wasted as a result of it. Therefore, I, taking all into my account, order the defendant to pay a sum of \$1,500.00, which is summarily assessed, to the plaintiff within 14 days.

### **The result**

1. Leave granted to the defendant to amend its statement of defence as proposed.



2. The defendant will file and serve its amended statement of defence as proposed on the plaintiff by 7 March 2019.
3. The plaintiff may file and serve a reply to the amended statement of defence by 8 March 2019, if need be.
4. The defendant shall pay summarily assessed costs of \$1,500.00 to the plaintiff within 14 days.
5. There will be no change in the trial dates.

*M.H. Mohamed Ajmeer*  
*13/3/19*

.....  
M.H. Mohamed Ajmeer

JUDGE



At Lautoka  
13 March 2019

Solicitors:

For the plaintiff: M/s Young & Associates, Solicitors

For the defendant: M/s Munro Leys, Solicitors