IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBC 325 of 2012

BETWEEN

DILIP KUMAR and **JYOTSNA KUMAR** both of Suva,

Trading as BINACO TEXTILES.

PLAINTIFFS

AND

PARSHOTAM LAWYERS (formally known as PARSHOTAM & COMPANY),

Barristers and Solicitors of Suva (a firm).

DEFENDANT

Counsel	:	Mr. Maharaj V. for the plaintiff Mr. Sharma D. for the Defendant
Date of Hearing	:	06th November 2020
Date of Ruling	:	02nd December 2020

RULING

(On the application to amend the statement of claim)

[1] The plaintiffs instituted these proceedings on 12th December 2012, seeking damages from the defendant. The reliefs sought in the statement of claim are as follows:

(a) Damages;

(b) Interest pursuant to Law Reforms (Miscellaneous Provisions)(Death and Interest) Act at the rate of 6% from the date of expiry of limitation period to the date of judgment or such rate as the court determines to be just in the circumstances and further statutory interest upon entry of judgment;

(c) Costs;

(d) Such further and other relief as this Honourable court may grant in the circumstances of the case.

[2] The plaintiff retained the defendant as their solicitors to sue the Insurance Company to claim compensation for the damage caused to their warehouse by fire.

[3] The plaintiffs in their statement of claim allege that due to the negligence of the defendant they were deprived of all prospects of recovering damages form the Insurance Company.

[4] The particulars of negligence as pleaded in the statement of claim are as follows:

(a) Failure to warn or advise the plaintiffs that the limitation period in terms of the said Insurance Policy within which an action for prosecution of the right in relation to claim for compensation pertaining to damage to the Plaintiffs' said property by fire was 12 (twelve) months from the happening of the loss or damage (i.e. from 10th September 1994) hereinafter referred to as ''limitation period''.

(b) Failure to commence an action to prosecute the right within 12 months from the happening of the loss or damage i.e. on or before 10th September 1995.

(c) Causing or permitting the said claim of the Plaintiff against the said Insurance Company to be or to become statute barred.

(d) The Defendants knew or ought to have known that the time within which the action should have been commenced was on or before 10th September 1995.

[5] The particulars of special damages as pleaded in the statement of claim are as follows:

> The Plaintiffs have paid the Defendants various sums on account of professional fees and they have been rendered liable to the said Insurance Company in respect of the costs of the said action (a schedule of particulars of legal fees and costs shall be provided in due course).

[6] In the proposed amended statement of claim (Paragraph 6) the particulars of negligence, *inter alia*, are as follows:

(e) The loss of opportunity to sue the said Insurance Company of succeeding in full and fuller measure;

(f) Failure to prosecute the plaintiffs' primary action against the said Insurance Company diligently and in timely manner thereby causing substantial delay and prejudice to the plaintiffs;

(g) Following the striking out by the High Court of the Primary Action on 19th May 2006 pertaining to the fire claim, the Defendants pursued an Appeal against the said decision through to the final Appellate Court consuming a period of approximately 6 years which Appeal the defendant knew of ought to have known wads without merit and barely arguable thereby causing further delay and prejudice to the prosecution of the plaintiffs' within claim;

(h) Failure to advise the plaintiffs at any time during their engagement as solicitors that the plaintiffs' cause is hopeless, without merit and bound to fail.

[7] In paragraph 7 of the proposed amended statement claim it is averred:

> By reason of the matters aforesaid, the Plaintiffs have lost the opportunity of recovering damages from the said Insurance Company. The said damages would have compromised the following:-

(i) Loss of stocks in the total value of $639,071.92 as a result of the fire;

(ii) Loss of interest at the rate of 10% pursuant to S:34 of The Insurance Law Reform Act 1996 for breach of implied condition in the Insurance Policy for the Failure of the said Insurance Company to settle the Plaintiffs' claim within the 12 months of the happening of the event or in any event within a reasonable time;

(iii) Loss of costs of the proceedings of the Primary Action.

[8] In paragraph 8 of the proposed amended statement of claim the plaintiffs claim from the defendants $46,750.00 as costs ordered by the Supreme Court and the Court of Appeal and also the legal fees paid to the defendants.

[9] The plaintiffs in the proposed amended statement of claim prays for the following reliefs:

(a) Damages for Loss of stocks in the total sum of $639,071.92;

(b) Interest at the rate of 10% pursuant to section 34 of the Insurance Law Reform Act 1996;

(c) Alternatively interest pursuant to Law reform Miscellaneous Provisions (Death and Interest) Act from the date of the issue of the writ or from such period at such rate as the Court deems appropriate in the circumstances;

(d) A sum of $46,750.00 being professional fee and cost paid by the plaintiffs for the Primary Action.

(e) Interest of $46,750.00 at the rate of 6% calculate from the date o payment to the date of judgment;

(f) Costs of within action;

(g) Such further and other relief as this Honourable Court may grant in the circumstances of the case.

[10] The defendants objected to this application for amendment on the grounds that the plaintiffs are seeking to introduce a new cause of action which is now time barred and to introduce a cause of action under a statute that has no relevance.

[11] The 2nd named plaintiff in her affidavit has admitted that the Insurance Law reform Act 1996 is of no relevance to this matter.

[12] The issue here is whether the plaintiffs should not be allowed to amend the statement of claim on the ground that the application was made after the expiration of the period prescribed by section 4 of the Limitation Act 1971.

[13] Section 4(1) of the Limitation Act 1971 provides:

> (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-
>
> *(a)* actions founded on simple contract or on tort;
> *(b)* actions to enforce a recognizance;
> *(c)* actions to enforce an award, where the submission is not by an instrument under seal;
> *(d)* actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:

[14] Order 20 rules 5 of the High Court Rules 1988 confers a very wide discretion on the court to allow applications for amendment of pleadings at any stage of the proceedings even if the new cause of action arose out of time.

[15] Order 20 rule 5 provides:

> 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.

[16] In **Land Transport Authority v Lal [2008] FJCA 79; ABU0053.2007S (7 November 2008)** the Court of Appeal held:

> It cannot be doubted that a High Court judge has the discretionary power under the High Court rules to allow the amendment of a claim by the addition of a new cause of action or the addition of a new party to the proceedings at any time (subject to certain qualifications), even where to do so gives rise to a claim being made against a newly added party outside a limitation period fixed by statute (see also s23 of the Limitation Act). But the exercise of the

discretion in allowing such amendments must, as always, be exercised in a principled and considered manner.

In **Cooper v Smith** (1884) 29 Ch. D. 700 Bowen LJ 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 otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by 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.
>
> 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 is a matter of right.

In **Kettemen & Ors v Hansel Properties Ltd & Ors** [1987] 1 A.C. 189 Lord Keith made the following observations:

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

The same principle was followed by the Fiji Court of Appeal in **Ahmed v Ibrahim** [2002] FJCA 74; ABU0081U.2000S (29 November 2002**).**

[17] These proceedings were instituted by the plaintiffs on 12th December 2012 and on 2nd February 2016 the defendants filed summons to strike out the claim of the plaintiffs pursuant to Order 18 rule 18 of the High Court Rules 1988 on the ground that the proceedings were instituted outside the period prescribed by section 4 of the Limitation Act 1971. On 23rd January 2017 the court made order dismissing the application.

[18] On 7th February 2017 the defendant filed an application before the High Court seeking leave to appeal the said dismissal to the Court of Appeal. The High Court delivered its ruling on 20th February 2019 refusing leave to appeal.

[19] The defendants then filed a renewed application to the Court of Appeal for leave to appeal which was dismissed on 25th September 2019.

[20] The learned counsel for the plaintiffs submits that this whole process took almost four years. The learned counsel for the defendants submits that there was no restriction on the plaintiffs to make an application for amendment since there was no stay order which is correct.

[21] At this stage it is pertinent to note the sequence of event that occurred in the action filed by the defendant acting as solicitors of the plaintiffs in this matter against the insurance company.

[22] On 18th September 1995 the defendants commenced an action by writ on behalf of the plaintiffs against the insurance company claiming damages for loss caused by fire. On an application by the insurance company, the action was struck out since the proceedings were not commenced within the 12 months period prescribed by clause 18 of the insurance contract. The plaintiffs appealed to the Court of Appeal. The appeal was dismissed and subsequently leave was given by the Court of Appeal for the plaintiffs to appeal to the Supreme Court. On 09th May 2012 the Supreme Court dismissed the appeal.

[23] In **Parshotam Lawyers v Dilip Kumar (trading as Bianco Textiles) [2019] FJCA 176; ABU13.2019 (25 September 2019)** (*Renewed application for leave to appeal*) Justice Calanchini in paragraph 27 of his ruling held that the six year limitation period ran out on 11th May 2018.

[24] Justice Calanchini also in paragraph 18 made the following observations:

> In my judgment it would be unreasonable to expect the Kumars to commence an action for professional negligence on the part of their lawyers when those same lawyers had commenced proceedings which they took all the way to the Supreme Court to establish in effect that they had not delayed in bringing an action for damages (compensation) against the insurance company. It was

only when the Supreme Court dismissed the appeal that the Kumars could be finally satisfied that their claim against the insurance company could not proceed on account of the delay by Parshotam Lawyers.

[25] The learned counsel for the defendants submitted that since there was no order staying the proceedings in this matter during the pendency of the application for striking out, the plaintiffs should have made this application without delay.

[26] In exercising its discretion the court see if any injustice would be caused to the parties if the application for amendment is granted or refused. In this matter what the plaintiffs intend to add to the pleadings are not new to the defendants. They acted on the instruction of the plaintiffs to sue the insurance company claiming compensation for the loss caused by fire. The other claim the plaintiffs are seeking to add to the statement of claim is the legal fees paid to the defendants. Therefore, it cannot be said that any injustice would be caused to the defendant if the amendments sought by the plaintiffs are allowed.

[27] The defendants submit that there is no valid reason offered by the plaintiff for the delay. It appears from what I have stated above that the law does not consider the cause for the delay in making the application to amend seriously. It only considers whether any injustice would be caused if the application for amendment is allowed or refused.

[28] The defendant cited the following paragraph from the decision in **Currie v Crystal Clear Mineral Water (Fiji) Ltd** [2015] FJHC 293; HBC38.2015 (10 March 2015):

> Before we consider the test necessary to determine the grant of leave to amend a writ it appears prudent to consider the effect of any amendment first. An amendment granted with or without leave takes effect from the date of the original document which it amends and not from the date on which the amendment is made. The logic is simply that an application to amend is an application to amend the original document such that when leave is granted or when an amendment is made it is to affect the original document. Therefore when an amendment is made to a writ the amendment dates back to when the writ was originally issued and the action continues as though the amendment was inserted from the beginning. The writ as amended becomes the origin of

the action. From the above it follows that a plaintiff cannot amend a writ by adding a cause of action which has accrued to him/her since the issue of the original writ (*see* ***Eshelby v. Federated European Bank Ltd*** *(1932) 1 KB 254).* The difficulty in accepting an amendment to a writ by adding a cause of action which accrued since the issue of a writ is the likely prejudice to a defendant of a defence already available to him. In most instances a Court will not refuse an amendment simply because it introduces a new case but it will refuse where the amendment would change the action into one of a substantially different character which would conveniently be the subject of a fresh action; (***Raleigh v. Goschen*** *(1898) 1 Ch.73); (see also paragraph 20/8/2, Vol. 1, White Book 1999 edition).*

[29] In that case the issue was whether an amendment should be allowed to add a cause of action accrued after the filing of the writ. In the matter before this court the cause of action sought to be added accrued prior to the filing of the writ. Hence the decision cited above is of no relevance.

ORDERS

1. Leave to amend the statement of claim is granted.
2. The plaintiff must file and serve the amended statement of claim within two weeks from date of this ruling.
3. There will be no order for costs.

Lyone Seneviratne

JUDGE

02nd December 2020