

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 12 of 2020

BETWEEN

CHAHAN ENGINEERING PTE LIMITED a limited liability company duly
incorporated in Fiji and having its registered office at
121 Laucala Bay Road, Suva.

PLAINTIFF

AND

COASTAL DEVELOPMENT LIMITED a limited liability company duly
incorporated in Fiji and having its registered office at
7/18 Aurora Avenue, Makoi, Nasinu, Fiji.

DEFENDANT

Counsel	:	Mr. Singh S. with Ms. Kelera S. for the Plaintiff Mr. Fatiaki S. for the Defendant
Date of Hearing	:	12 th April 2021
Date of Ruling	:	20 th September 2021

RULING

(On the Application for Specific Discovery)

[1] The plaintiff instituted these proceedings making the following claims from the defendant:

- a. Judgment for \$341,187.58
- b. Damages under section 146 of the Commerce Commission Decree 2010
- c. General damages
- d. Interest
- e. Costs
- f. Such further and/or other orders as the Honourable Court deems just and necessary.

[2] On 10th February 2021 the plaintiff filed a summons pursuant to Order 24 rules 3 and 4 of the High Court Rules 1988 seeking the following orders:

1. That the defendant discover the following documents verified by an affidavit in its power, custody and control and provide copies of the said documents to the plaintiff:
 - A. Copy of FRA Contract No. 18/01 – Vunisei Vacala;
 - B. Copy of FRA Contract No. 18/10 – Central Division Unsealed Road Package 1;
 - C. Copies of all payment claims made by the defendant to Fiji Roads Authority from 18 February 2019 to 18 March 2020 (inclusive of all engineering consultancy and design work done by the plaintiff); and
 - D. Copies of all payment approvals by the Fiji Roads Authority from 18 February 2019 to 18 March 2020 for the work done by the defendant (inclusive of all engineering consultancy and design work done by the plaintiff); and
2. The costs of this application be paid by the defendant on an indemnity basis.

[3] The plaintiff and the defendant entered in to two agreements for the plaintiff to provide professional engineering services to the defendant, on 08th November 2018 and 23rd March 2019. The numbers of the two agreements are 18/01 and 18/10. On 22nd November 2019 the defendant terminated both agreements.

[4] Order 24 rule 7 of the High Court Rules 1088 provides:

- (1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it.
- (2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.
- (3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.

[5] The requirements, a party who seeks specific discovery of documents, has to satisfy have been discussed in many previous authorities and the learned counsel for the defendant has cited the following previous decisions:

Singh v Minjesk Investment Corporation Ltd & Anor Civil Action No. 148 of 2006 -

- (i) Identify clearly the particular document or documents or class of documents that he seeks from to be discovered by the opposing party (see Order 24 Rule 7 (1)).
- (ii) Show a prime facie case that the specific document or class of documents do in fact exist or have existed (see Order 24 Rule 7 (1)).

- (iii) Establish that these documents are relevant in the sense that they relate to the matter in question in the action. In other words, the information in the document must either directly or indirectly enable the applicant either to advance his own case or to damage the case of his or her adversary. Alternatively, it is sufficient if the information in the document is such that it may fairly lead to a train of enquiry which may have either of these consequences. The relevance of a document is to be tested against the issues and/or questions raised by the pleadings (see *A. B. Anand (Christchurch) Ltd v ANZ Banking Group Limited* (1997) 43 FLR 22 January 1997).

It is important to note that whether or not any particular document is admissible or inadmissible is immaterial to its discoverability. It is enough if the document is likely to throw some light on the case (see Volume 13 paragraph 38 of Halsbury's Laws of England – 4th Edition) page 34 cited in *Singh v Minjesk*.

- (iv) Show that these documents were in the physical possession, custody (i.e. the mere actual physical or corporeal holding of the document regardless of the right to its possession) or power (i.e. the enforceable right to inspect it or to obtain possession or control of the document from one who ordinarily has it in fact) of the opposing party (see Order 24 Rule 7 (3).3.4)

Kalabo Investments Ltd v New India Assurance Co Ltd [2019] FJCA 210; ABU0010.2019 (4 October 2019) –

[30]Relevance to a matter in issue is necessarily linked to the pleadings. What is not pleaded cannot ordinarily be presumed to be related to the matter in issue, because it is assumed that only matters in dispute are contained in pleadings, and that relevant matters would not have been excluded from the pleadings. Thus, unless a matter was put in issue in the pleadings, or later admitted, it cannot subsequently be regarded as a matter in issue. If the Respondent had, in its Statement of Defence put in issue, the matter of applicability of Average to the claim of the Appellant, the Appellant could have countered it in reply. However, because the Respondent did not plead Average nor was it recorded in the Pre-Trial Conference Minutes, in my view there is no legal basis on which the Respondent's application for discovery

could have been allowed and I will in due course, deal with the reasons for that finding.

[32] The Respondent in its written submissions relies on the following extract of the judgment in *Mulley v Manifold* [1959] HCA 23; (1959) 103 CLR 341, where the High Court of Australia said:

“I now turn to the pleadings to determine what are the matters at issue between the parties, because discovery is a procedure directed towards obtaining a proper examination and determination of these issues—not towards assisting a party upon a fishing expedition. Only a document which relates in some way to a matter in issue is discoverable, but it is sufficient if it would, or would lead to a train of enquiry which would, either advance a party's own case or damage that of his adversary.”

However, my reading of the judgment in *Mulley v Manifold* (*supra*) reveals that the court also said the following:

“8. The affidavit filed here, however, affords no substantial assistance upon what is the only important question, i.e., whether certain documents, of which some do exist and some may or may not exist, do, or if they were to exist, would, relate to any matter in question in the actions. This is clearly something that must be determined from the pleadings, not from an argumentative affidavit” (Emphasis added)

[34] Accordingly, I am unable to accept the submissions of the Respondent, not only because the procedure relating to the discovery of documents cannot be used as a means of filling in gaps in pleadings and delaying court proceedings, but also because as in this case, the conditions precedent to an Order under Rule 24 of the High Court Rules 1988, as amended, were not established before the court. The impugned order could therefore not have been made.

[35] In support of the Appellant's argument that issues and relevancy are defined by the pleadings it relied inter alia on the judgment in *Harrods*

Limited v Times Newspaper Limited and others [2006] EWCA 294 at [12] in which Lord Chadwick said:

In my view the judge was plainly correct to approach the application for further disclosure on the basis that it was essential, first, to identify the factual issues that would arise for decision at the trial. Disclosure must be limited to documents relevant to those issues. And, in seeking to identify the factual issues which would arise for decision at the trial, the judge was plainly correct to analyse the pleadings. The purpose of the pleadings is to identify those factual issues which are in dispute and in relation to which evidence can properly be adduced. It is necessary, therefore, to have in mind the issues as they emerge from the pleadings and are relevant in the present context.”

Ram v Colonial Fiji Life Ltd [2012] FJHC 1231; Civil Action 08.2010 (25 July 2012) –

In Berkely Administration –v- McClelland (1990) F.S.R. 381 the Court stated the principle governing specific discovery as follows:-

1. There is no jurisdiction to make an order under RSC, O24, r7, for the production of documents unless; (a) there is sufficient evidence that the documents exist which the other party has not disclosed; (b) the documents relates to matters in issue in the action; (c) there is sufficient evidence that the document is in the possession, custody or power of the other party.
2. When it is established that those three prerequisites for jurisdiction exists, the Court has jurisdiction whether or not to order disclosure.
3. The order must identify with precision the document or documents or categories of document which are required to be disclosed, for otherwise the person making the list may find himself/herself in serious trouble for swearing to a false affidavit even though doing her/his best to give an honest disclosure.

But what happens if the application is for discovery against a party who is not a party to the proceedings? It is possible to obtain discovery

from a party who is not a party to the proceedings. This occur only in situations where the non party to be discovered is a servant or an agent of a corporation and that those documents are in their possession. (see *Harrington –v Polytechnic of North London & Others* (1984) WLR 1293). But as a general rule discovery can only be obtained between parties to the action; (*James Nelson & Sons Ltd –v Nelson Line Ltd* (1906) 2 K.B.217 at 233, 234;*Shaw v- Smith* (1886)18 Q.B.D. 193 at 197;*Burchand –v- Macfarlane* (1891) 2 Q.B. 241 at 247,250,251. In *Gulf Investments (Fiji) Pty Limited -v – Reserve Bank of Fiji* (2009) HBC 154/09 Justice Inoke stated without specific reference to Order 24 discovery that:

Discovery should not be ordered against a party against whom no reasonable cause of action has been pleaded"

It is clear from the application that the documents the subject of the discovery is with a third party against whom no reasonable cause of action has been pleaded neither is the third party an agent of the Defendant from which discovery could be made.

[6] The defendant opposed this application on various grounds. The learned counsel for the defendant submits that the plaintiff has failed to identify clearly the documents that are being sought to discover.

[7] The 1st two documents sought to be discovered are the two agreements; No. 18/01 – *Vunisei Vacala* and No. 18/10 – *Central Division Unsealed Road Package*. These are agreements between the defendant and the Fiji Roads Authority (FRA). In paragraphs 6 and 8 of the affidavit in support it is stated:

6. The contract that the plaintiff had with the Defendant and the principal contract between FRA and the Defendant will have to be read together so that the Honourable Court is best placed to make assessment of the claim of both parties.

8. The Defendant is paid by the FRA based on works done by it. The plaintiff's engineering consultancy services is part of the Defendant's contract with FRA and each of its payments claims to FRA will show the level of works

that the plaintiff has done for which payment has been claimed by the Defendant and the value of that payment.

[8] The plaintiff's claim is based on the agreement with the defendant. The plaintiff has not explained in detail in the affidavit in support how the contracts between the defendant and the FRA become relevant to his claim.

[9] In the affidavit in opposition it is averred that the agreements between the defendant and FRA are confidential and commercially sensitive.

[10] Paragraph 5.1 of the agreements between the plaintiff and the defendant which are identical except the contract price, provides as follows:

CDL SHALL PAY THE CONTRACTOR THE SUM OF FJD\$..... ONLY UPON COMPLETION OF THE WORKS IN ACCORDANCE WITH SCHEDULE WHICH SHALL BE FURTHER SUBJECT TO CDL AND SUCH PAYMENT SHALL BE MADE IN ACCORDANCE WITH THE ATTACHED PAMNENT SCHEDULE.

[11] The plaintiff's claim in this matter is based on the agreement between the plaintiff and the defendant. The defendant position in this matter is that the invoices are disputed and the some of the drawing and designed provided by the plaintiff have been rejected by the FRA. Under the agreement the defendant need not be paid by the FRA for them to make payments to the plaintiff.

[12] Therefore, I see no relevance of the agreements between the defendant and the FRA to the before this court.

[13] The plaintiff is also seeking the copies of payment claims made by the defendant to the FRA between 18th February 2019 to 18th March 2020 and all payment approvals by the FRA from 18th February 2019 to 18th March 2020.

[14] This action was instituted on 14th January 2020 and the plaintiff cannot include any claim accrued to it after the institution of these proceedings.

[15] The plaintiff in this matter claims a liquidated amount against the defendant as pleaded in paragraphs 9 and 10 of the Statement of claim which is the amount due for the work done as at the date of the termination of the contract. The burden is on the plaintiff to establish that this amount was in fact due and owing to it from the defendant at the time of instituting these proceedings.

[16] The plaintiff has failed to show the court how these receipts and payment approvals exchanged between the defendant and the FRA are relevant to its claim against the defendant. Whether the FRA paid the defendant or not, the defendant is liable to pay for the work done by the plaintiff.

[17] It is also important to note that the plaintiff has not specifically identified the receipts and approvals relevant to his claim against the defendant and also whether all these documents sought to be discovered are in possession of the defendant.

[18] For the above reasons the court makes the following orders.

ORDERS

- 1) The summons filed by the plaintiff on 10th February 2021 is struck out and the orders sought therein are refused.
- 2) There will be no order for costs of this application.

Lyone Seneviratne

JUDGE

20th September 2021