

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 268 of 2008

Interiorz & Exteriorz Engineering and Civil Works Limited

First plaintiff

Kalpesh Kumar Patel

Second plaintiff

v

Abdul Aleem

First defendant

Abdul Shaheem

Second defendant

Counsel: Mr A. Nadan for the plaintiffs
Mr Sunil Kumar for the defendants
Date of Hearing: 24th June, 2022
Date of Ruling: 23rd September, 2022

Ruling

1. By summons filed on 13th April,2022, the plaintiffs seeks leave to amend their statement of claim filed on 18th August,2008.

2. The supporting affidavit states that interlocutory judgment was entered against the defendants. The application of the defendants to set aside the judgment was unsuccessful. On application by the plaintiffs, the Registrar of Titles declined to enforce the judgment, as the issue of fraud was not determined and the judgment did not specifically direct the Registrar to cancel Transfer No. 702900. On 24th February, 2021, their solicitors received a letter from the Attorney General's Chambers that prayer 1 of the statement of claim has an error. The affidavit concludes that if the amendment is not allowed, the plaintiffs will be severely prejudiced and their interest in the property is at risk.
3. The affidavit of the first defendant states that the summons is irregular. It does not bear the signature of the solicitor. Personal Assistants/Litigation Officers are not allowed to swear affidavits in contested proceedings. The authority given to the Personal assistant/litigation officer is undated and more than a year old. Messrs. Neel Shivam Lawyers have a conflict of interest for the stated reasons (referred to below). The amendment is not possible, given the interlocutory judgment is a final judgment, as setting aside of the same was refused. The action has been summarily dealt with and the plaintiff has attempted execution. This Court is functus.
4. The affidavit in reply filed by the second plaintiff states that Neel Shivam Lawyers acted on his instructions to register the first plaintiff. At the time of registration, the defendant and he were Directors. After the company was incorporated, the defendants "*deceitfully and without (his) knowledge ...transferred the property belonging to the company to (the first defendant)*", in breach of their duties as Directors. The proposed amendment does not give rise to a new cause of action. The Court can, in the interest of justice grant an amendment.

The determination

5. At the hearing, Mr Kumar, counsel for the defendants submitted that a Personal Assistant/Litigation Officer of the solicitors for the plaintiffs has sworn the supporting affidavit containing contested matters.
6. The affidavit does allege “*fraudulent actions of the Defendants..*”, which I disregard.
7. Mr Kumar pointed out that the plaintiffs have failed to highlight the proposed amendments in red. Subsequent to the hearing, that requirement has been complied with.
8. The first defendant alleges that the solicitors for the plaintiffs have a conflict of interest for the reasons that they acted for him when he formed the first plaintiff, drafted documents for the sale of the first plaintiff’s property and when the first plaintiff cleared its debt with Colonial National Bank. They possess knowledge that will be used to his detriment.
9. The facts in ***Manubhai & Co. Ltd v Herbert Construction Company (Fiji) Ltd***, [2014] FJCA 175; ABU0002.2010 (29 May, 2014) were similar to the present matter in that the solicitor in that case had incorporated the respondent company and may have been in possession of information on the financial viability of the company. Almeida Guneratne, JA at paras 78 to 80 stated:

The professional right of a lawyer as well as a client's right to retain a lawyer of his or her choice ought not to be interfered with lightly unless there are compelling reasons to do so.

Otherwise there would result applications on the flimsiest of grounds merely because a lawyer appearing on behalf of a new client had in the past done work for the adverse party in the new litigation.

Accordingly if one seeks to find a principle applicable in the present context, I venture to expound as a proposition in the context of lawyer/client relationships that, in order to restrain or disqualify a lawyer from appearing for a new client in an action against a former client on whatever ground, whether it be an alleged breach of confidentiality, a fiduciary duty, conflict of interest or potential to be called as a witness, there must be shown to exist either in the pleadings or in the evidence, a direct nexus between the cause of action pleaded in an ongoing action and the work the lawyer is said to have performed for the former client.

10. In my view, the defendants have not shown a nexus between the fraudulent transfer of property pleaded in the statement of claim and incorporating the first plaintiff, selling its property and clearing its debt.
11. On 30th May, 2012, I entered interlocutory judgment against the defendants.
12. On 11th February, 2013, the application of the defendants to set aside the judgment was struck out.
13. On 4th September, 2017, I declined the summons of the plaintiffs made under Orders 20, r.10, 45, r.5 and 19.9 to vary or amend the judgment.
14. On 12th April, 2022, I declined the application to strike out the statement of claim.
15. In ***Reddy Construction Co Ltd v Pacific Gas Co Ltd*** [1980] FJCA 15; Civil Appeal 47 of 1979 (27 June, 1980) Speight JA stated:

The primary rule is that leave may be granted at any time to amend on terms if it can be done with-out injustice to the other side. The general practice .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. ... 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.(emphasis added)

16. In the *Duke of Buccleuch*, [1892] P 201 Fry LJ stated:

I base my decision upon the words “at any stage of the proceedings.” It has been argued that the rules do not apply after final judgment. They apply, in many opinion, as long as anything remains to be done in the case. In this case there remains the assessment of damages. In this instance the name of a person has been improperly joined as plaintiff and the names of other persons are necessary to settle the questions at issue. It is the duty of the court to add the names of the right plaintiffs. (emphasis added)

17. In the present case, the proposed amendments relate to careless errors in the statement of claim which refer to the first plaintiff company as a Director, the first defendant as a company, to a third defendant and prayer 1, which sought the reversal or transfer of the property from the second defendant to the first defendant.

18. I allow the amendments proposed to paragraphs 1 to 5, 10 to 14, 17 to 25 and prayer 1 of the statement of claim, in order to give effect to the judgment entered. There is no basis for the plaintiffs now to seek indemnity costs.

19. **Orders**

- a. The summons of the plaintiffs to file the proposed amendments to 1 to 5, 10 to 14, 17 to 25 and prayer 1 of the statement of claim is allowed.
- b. I make no order as to costs.



A.L.B. Brito-Mutunayagam
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JUDGE
23rd September, 2022