

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

**Civil Action No. HBC 289 of 2019
Civil Action No. HBC 356 of 2019**

BETWEEN : **WR CARPENTER (SOUTH PACIFIC) PTE LIMITED** a limited liability company having its registered office at Carpenters Building, 34 Rodwell Road, Suva.

First Plaintiff

: **CARPENTERS FIJI PTE LIMITED** a limited liability company having its registered office at Carpenters Building, 34 Rodwell Road, Suva.

Second Plaintiff

: **PROPERTIES TRUST (FIJI) PTE LIMITED** a limited liability company having its registered office at Carpenters Building, 34 Rodwell Road, Suva.

Third Plaintiff

AND : **NEW INDIA ASSURANCE COMPANY PTE LIMITED** a body corporate duly registered under the Insurance Act with its head office in India and its registered office in Suva at the corner of Renwick and Greig Street, Suva.

Defendant

Representation

Plaintiff's: Mr. S.J. Stanton & Mr. M.F. Khalim (Patel Sharma Lawyers).

Defendant: Mr. M.Y.F. Haniff (Haniff Tuitoga).

Date of Hearing: 24th July 2024.

RULING

A. Introduction and Background

[1] The Defendant on 9th April 2024 filed summons seeking **leave to amend the statement of defence** pursuant to **Order 20 Rule 5** of the High Court Rules 1988. The summons

was accompanied by an affidavit of Merelita Nagera (a Solicitor in employ of Haniff Tuitoga). An affidavit in opposition of Preeti Priya Prakash Nand, Manager Legal of Carpenter Group of Companies was filed.

- [2] On 16th November 2023 the lawyers for the parties sought September and October 2024 trial dates. I was advised that lawyers from overseas would be involved. The PTC and the bundle of documents were all complete. **HBC 289 of 2019** is set for trial from 3rd to 6th September 2024. HBC 289 of 2019 deals with fire incident (17th April 2018) and insurance claim for the property, including the plant, buildings, equipment, goods and business at Nausori. **HBC 356 of 2019** from 17th to 20th September 2024. HBC 356 of 2019 deals with fire incident (8th April 2018) and insurance claim for the property, including the plant, buildings, equipment, stocks, goods and business at Walu Bay, Suva.

B. Analysis

- [3] Order 20 Rule 5 of the High Court Rules 1988 allows for amendment of writ or pleading with leave. The Court has a discretion to allow any amendment to writ or pleading. The exercise of the discretion of the court has been subject of numerous judicial proceedings. In **G L Baker Ltd v Medway Building and Supplies Ltd [1958] 3 All ER 540**, Jenkins LJ stated “...it is a guiding principle of cardinal importance on this question that, generally speaking, all such amendments ought to be made “as may be necessary for the purpose of determining the real questions in controversy between the parties”.

- [4] The submission for the Defendant is that they wrote to the Plaintiff’s lawyers seeking to amend its defence. They had included the proposed amended statement of defence. The Defendant seeks to rely on a Material Damage/Business Interruption Policy issued by the Defendant together with the schedule accompanying the Insurance Policy. According to the Defendant these documents delineate the coverage and conditions under which the claims are made. It is vital for the defence. The proposed amendments address recent developments and allegations that might have bearing on the determination of issues in these matters.

- [5] The Plaintiff’s Lawyers submission is that the proposed pleading does not even condescend to degree of particularity. The list of documents has appeared for the first time and no explanation is given for the circumstances, how it is or why it is that the insurance policy has now been found and as to where and why it has not been forthcoming as the pleading closed long time ago. The Plaintiff’s raise concerns the late appearance of the document which requires the Court to consider, whether it should allow the amendment or not.

- [6] Both parties made comprehensive submissions and cited relevant case authorities which are of assistance to the Court. I take particular note of **Tildesley v Harper [1874-80] All ER rep Ext 1612, 10 Ch D 393; 48 LJ 495; 39 LT 552; 27 WR 249 (18th November 1878)**, it contains the oft-quoted judgment of Bramwell LJ on the question of the amendment of pleadings as follows:

"[f]rom having had much to do in chambers with applications for leave to amend, I may, perhaps, be allowed to say without presumption that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend, unless I have been satisfied that the party applying has been acting malâ fide, or, by his blunder, has done some injury to the other side which cannot be compensated for by costs or otherwise. I confess that in this case I should have had some doubt whether there had been a bonâ fide mistake made by the defendant, as the mistake is so very obvious. I should have required some statement or affidavit by the solicitor to show that the slip in pleading was bonâ fide, and, if satisfied on that point, I should not have refused leave to amend." and a bit further on he said:

"It is quite right that the rules of the court should be observed, and that a party should be fined for his mistake, but the fine should be measured by the loss to the other side, and not by the importance of the stake between the parties."

[7] I further take note of Brett MR in *Clarapede v Commercial Union Assocn ((1883), 32 W R 262, 263* where he said on the amendment of pleadings as follows:

"However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but, if the amendment will put them into such a position that they must be injured, it ought not to be made."

[8] In *Reddy Construction Co Ltd v Pacific Gas Co Ltd [1980] FJCA 15; Civil Appeal 47 of 1979 (27 June 1980)* and in *Sundar v Prasad [1998] FJCA 19; Abu0022u.97s (15 May 1998)* the Fiji Court of Appeal has followed the line of English authorities dealing with amendment to pleadings, like *Clarapede* (supra), *Tildesley* (supra) and *G L Baker Ltd* (supra). It is important to draw out the issues contained in the statement of Brett MR in *Clarapede* (supra). It crystalizes the position which has been followed ever since. **First**, an amendment will be allowed if it will enable real issues between the parties to be considered. **Secondly**, fault (short of fraudulent tactics) will not bar an application for amendment. **Thirdly**, a party will be allowed to amend provided the detriment suffered by the other party does not include injury which cannot be compensated by award of costs.

[9] While it is late, I am of the view that the proposed amendment will enable the real issues between the parties to be considered. The facts alleged in the amendment in fact are questions to be decided by way of evidence at a trial and will assist the parties in determining their issues. The proposed amendments will not prejudice the Plaintiff. It will not cause injustice to the Plaintiff as the Plaintiff will have the right to amend its reply to the statement of defence.

[10] I also wish to inform the parties that the trial will not be adjourned as I wish to draw the attention of the parties to **Section 15 (3) of the Constitution of the Republic of Fiji**

which provides that “... *every party to a civil dispute has the right to have the case determined within a reasonable time.*” These matters were initiated in September and October 2019, respectively. It is about 5 years from its initiation that we will be going to trial for these matters. We need to ensure that we comply with our Constitution, which is the supreme law. 5 years is a long time for a civil matter to be pending in our Court. The parties to civil dispute need their cases to be determined within a reasonable time. 5 years is way too long. It is not reasonable time. With this in mind I seek that the parties promptly comply and see that everything is done in order and that they are ready for the trial on the dates already set. The parties are to ensure that the amendments, supplementary affidavit verifying list of documents, amended PTC Minutes (if any) are filed in time.

[11] The Defendant’s application seeking leave to amend the Statement of Defence is granted. Costs in cause.

C. Court Orders

- (a) The Defendant’s application seeking leave to amend the Statement of Defence in terms of proposed Amended Statement of Defence is granted.
- (b) The Defendants are to file and serve their Amended Statement of Defence within 3 days from today.
- (c) The Plaintiff upon being served the Amended Statement of Defence are at liberty to reply and file and serve an Amended Reply to Statement of Defence, 7 days thereafter.
- (d) The parties are at liberty to file and serve supplementary affidavit verifying list of documents within 14 days from today.
- (e) There shall be inspection of documents within 7 days of service of the list of notice to inspect the same.
- (f) The Parties are to discuss and hold a Pre-trial conference and file an amended PTC Minutes if the wish to amend any agreed facts, issues for determination and agreed documents, one (1) week before the trial.
- (g) Costs in the application be costs in cause.

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Chaitanya S.C.A. Lakshman

Puisne Judge
30th July 2024

