

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 236 of 2014

BETWEEN:

TRADEWINDS MARINE LIMITED
PLAINTIFF

AND:

TOKOMARU LIMITED
1ST DEFENDANT

AND:

MOTIBHAI & COMPANY LIMITED
2ND DEFENDANT

AND:

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
3RD DEFENDANT

AND:

THE DIRECTOR OF LANDS
4TH DEFENDANT

AND:

THE REGISTRAR OF TITLES
5TH DEFENDANT

AND:

ATTORNEY GENERAL
6TH DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:

A.K. Lawyers for the Plaintiff
Howards Lawyers for the 1st Defendant
Sherani & Co. for the 2nd Defendant
Parshotam Lawyers for the 3rd Defendant
Office of the Attorney General for the 4th & 6th Defendants

Date of Hearing:

By way of Written Submissions

Date of Ruling:

31 July 2024

RULING

01. The Plaintiff on the 19/10/2020 have filed a Summons seeking the following orders,

- “1. That Port Denarau Centre Owners Incorporated (PDCOI) be joined to this proceedings as the Second Named Plaintiff.*
- 2. That Director Town and Country Planning and the Nadi Rural Local Authority be joined to these proceedings as the Seventh and Eighth Defendants respectively.*
- 3. That the Plaintiffs file an amended Writ and Statement of Claim within 7 days.*
- 4. That Director Town and Country Planning and Nadi Rural Local Authority file an appearance or defence upon which they intended to rely within 14 days after service of the amended Writ and Statement of Claim.*
- 5. That the substantive matter be temporarily stayed pending the determination of the application for joinder of parties to the proceedings.*

6. *Such further or other directions as the court deems just.*

7. *Costs to be in the cause.”*

02. This summons was supported with an Affidavit of one David Philip, a Director of the Plaintiff Company.
03. Pursuant to the Affidavit in Support, it is submitted that the intended 2nd Plaintiff, The Port Denarau Center’s Owners Incorporated (PDCOI), was originally set up *‘by or on behalf of the First Defendant to manage, control and maintain the commercial and retail development on and to take a transfer of State Lease 16977’*. It is further submitted that PDCOI, now manages and maintains the Retail Centre and looks after the interests of the owners of the leases on the Centre.
04. It is further submitted that the dispute in this case arose when the 1st Defendant attempted to sell the ‘car park’ of the Retail Centre, which comes under a different lease, to any other potential investor.
05. It is however submitted that there had been a condition imposed by the intended 7th Defendant, the Director of Town and Country Planning (DTCP), who had the control over the approval of the development lease of the ‘Retail Centre’, to have the lease for the Centre and the lease for the land of the car park facility for the Centre to be amalgamated.
06. Although the above condition was a prerequisite to the approval granted for the development, it is alleged that the developer, however, had obtained the consent for subdivision of the land for the car park facility and had obtained a separate lease for the same, without the knowledge and/or consultation of the Plaintiff and/or the intended 2nd Plaintiff.
07. The Plaintiff and the intended 2nd Plaintiff had, from the time this dispute arose, had got involved with discussions, including the intended 7th Defendant, the Director of Town and Country Planning (DTCP) and the 8th Defendant, the Nadi Rural Local Authority. The said discussions and dealings had involved the intended 2nd Plaintiff and the intended 7th and 8th Defendants and had been on foot since the year 2009.
08. The Plaintiff has alleged that the DTCP had later consented to issue separate leases on the car park by waiving a condition in the original consent granted by the DTCP for the development lease, which is for the above-mentioned two leases to be amalgamated. It is revealed that this alleged waiver occurred somewhere in 2007, without the knowledge of the Plaintiff and/or the intended 2nd Plaintiff.

09. Plaintiff further alleges that the NRLA which had the authority to issue the Completion Certificate for the development had issued the Completion Certificate to the 1st Defendant, ignoring the fact that the developer had failed to comply with the condition of amalgamation of the said two leases.
10. Plaintiff, as per the above disclosed facts, thus intimates that both the DTCP and the NRLA by their actions, as mentioned above, have contributed to the material issue that had given rise to the cause of actions relied upon by the Plaintiff in this action.
11. Plaintiff submits that the PDCOI, as a party that had been engaged in the material dispute, central to these proceedings, long before the inception of this case, necessarily needs to be added as the 2nd Plaintiff, as it is a necessary party to the proceedings. In the same context, the Plaintiff claims that the DTCP and the NRLA must be joined to these proceedings as Defendants.
12. Plaintiff further claims that the important role of the DTCP and NRLA were identified through documents discovered through the discovery process in 2016 but before filing an application for joinder, the Plaintiff had to deal with a Notice of removal of caveat and thereupon an Application by the Plaintiff for an extension of the caveat and an injunction. It is therefore submitted by the Plaintiff that till the decision in that application was delivered, the Plaintiff 'was not in a position to join the parties' as of this application.
13. The Defendants have opposed this application. The 2nd Defendant and the DTCP have filed Affidavits in Opposition. The 1st and 2nd Defendants and the Attorney General's Office have filed written submissions in opposition of the application.
14. The main grounds of opposition are that the claim of the Plaintiff against the intended 7th and 8th Defendants are time barred pursuant to the Limitations Act 1971 and that the Plaintiff has failed to satisfy the requirements under Order 15 Rule 6 (5) and (6) for this application to succeed. It is further submitted that the remedy against the intended 7th and 8th Defendants should have been an action for judicial review pursuant to the provisions in the Town Planning Act and that the Plaintiff has no remedy under private law by way of a Writ of Summons.
15. It is also opposed on the ground that the intended 2nd Plaintiff has no cause of action against the Defendants and/or that the intended 2nd Plaintiff has no *locus standi* to be joined as a Plaintiff in these proceedings.
16. It is also submitted in opposition to the application for joinder that if it is to be allowed, it will cause further delay in the proceedings and cause prejudice to the Defendants as this is a matter initiated in the year 2014 and the Plaintiff is making this application 06 years after the initiation of these proceedings.

17. Written submissions have been filed before the previous Master of this Court, by the Plaintiff, 1st and 2nd Defendants and for the Attorney General's Office. The Plaintiff has further filed a written submission in Reply on 20/04/2022.
18. The court shall consider the affidavits in evidence for and against the application and as well as the written submissions whilst deciding on this application.
19. Pursuant to the proposed Amended Statement of Claim, the Plaintiff's inclusion of the 2nd Plaintiff to the action is based on the following ground,

“the second named Plaintiff was originally set up by the developer and/or which helped the controlling interest in the first Defendant to manage control and maintain the commercial and retail development (the Retail Center) on and to take the transfer of state lease 16977 (of which it is now the Lease) and currently manages, controls and maintains and looks after the interests of the owners and members of the second named Plaintiff (who as the context may require are collectively included in the reference to the second named Plaintiff) of the subleases in the retail center and its services pursuant to its constitution.”

20. The claim against the intended 7th and 8th Defendants are based on the ground that the,

“Seventh and Eighth Defendants wrongfully and negligently waived/varied and or modified the development approval conditions granted to the developer of the Retail Centre without the consent of or notice to and consultation with the Plaintiffs when they knew or ought to have known that such waiver, variation or modification would to defeat the Plaintiffs interest thereby causing loss and damage to them”.

21. As per the prayers made in the proposed Amended Statement of Claim, the Plaintiffs are claiming the following reliefs from the Court.

1. *An order that the 5th Defendant do correct the Register of State Lease No. 13734 and cancel the Partial Surrender Number 748256 purportedly registered on 10th August 2011.*
2. *The 5th Defendant do correct the Register of State Lease No. 18542 by cancelling State Lease 18542.*
3. *The 1st to the 6th Defendants be restrained from entering any dealings and transactions State Lease No. 13734 or registering any instruments of whatsoever nature on State Lease 13734 or 18542 pending the*

registration of the interest or rights of the Plaintiffs granted by this Honorable Court.

4. *Damages.*
 5. *Such further or other orders as this Honorable Court deems just an expedient.*
 6. *Cost to be paid by the Defendants jointly and/or severally on a solicitor/client full indemnity basis.”*
22. By this application for joinder and amendment of the Writ and the Statement of Claim, it is apparent that the Plaintiff intends to add a new cause of action against the intended 7th and 8th Defendants and that such cause of action, on plain reading of the facts averred in the affidavits, is out of the relevant period of limitation pursuant to section 4 (1) (d) (i) of the Limitation Act 1971.
23. Counsel for the Plaintiff, however, argues that the Plaintiff’s application to amend the Writ and Statement of claim by joining the intended Defendants as per the proposed cause of action is covered under Order 15 Rule 6 (5) and (6) of the High Court Rules read with section 23 of the Limitation Act and Order 20 Rule 5 of the High Court Rules. Plaintiff has also relied on the case authorities in *Wehrenberg v Suluka*; ABU99.2017 (6 July 2018), *Zoeller v Bramhill*; HBC171.2008 (17 November 2015), *Prasad v Saheed*; HBC50.2003 (29 August 2008) and *Dorney v Sunflower Airlines Limited* [1994] FJHC 176.
24. In support of the grounds for opposition of the application, the Defendants have relied on the case authorities in *Fiji Development Bank v New India Assurance Company Ltd*; HBC299.2003 (10 August 2011), *Kososaya v Director of Lands*; HBC124.2009 (17 April 2013), *Prasad v State* (no.6) [2001] FJLawRp 6; [2001] FLR 39, *Prasad v Saheed*; HBC50.2003 (29 August 2008), *State v Director of Town and Country Planning*; HBJ7J2006S (24 September 2008), *Lakshman v Estate Management Services Ltd*; ABU14.2012 (27 February 2015) and *The State v Tauz Khan, Director of Town and Country Planning & Others*; HBJ14.1996.
25. The Plaintiffs current application has been made pursuant to Order 15 Rule 4 and 6 and Order 20 Rule 5 of the High Court Rules 1988. The said Rules reads as follows,

“Order 15 Rule 4

- 4.-(1) *Subject to rule 5(1), two or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court or where–*
- (a) *if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions, and*

- (b) *all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.*
- (2) *Where the plaintiff in any action claims any relief to which any other person is entitled jointly with him, all persons so entitled must, subject to the provisions of any Act and unless the Court gives leave to the contrary, be parties to the action and any of them who does not consent to being joined as a plaintiff must, subject to any order made by the Court on an application for leave under this paragraph, be made a defendant.*
- This paragraph shall not apply to a probate action.*

Order 15 Rule 6

- 6.-(1) *No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.*
- (2) *Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application—*
- (a) *order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;*
- (b) *order any of the following persons to be added as a party, namely—*
- (i) *any person who ought to have joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or*
- (ii) *any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.*
- (3) *An application by any person for an order under paragraph (2) adding him as a party must, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.*
- (4) *No person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.*

(5) *No person shall be added or substituted as a party after the expiry of any relevant period of limitation unless either—*

(a) the relevant period was current at the date when proceedings were commenced and it is necessary for the determination of the action that the new party should be added, or substituted, or

(b) the relevant period arises under the provisions of subparagraph (i) of the proviso to paragraph 4(1)(d) of the Limitation Act Cap 13A High Court Rules 173 and the Court directs that those provisions should not apply to the action by or against the new party. (Cap 35 v2 p870,021)

In this paragraph “any relevant period of limitation” means a time limit under the Limitation Act. (Cap 35 v2 p870,021)

(6) *The addition or substitution of a new party shall be treated as necessary for the purposes of paragraph (5)(a) if, and only if, the Court is satisfied that-*

(a) the new party is a necessary party to the action in that property is vested in him at law or in equity and the plaintiff’s claim in respect of an equitable interest in that property is liable to be defeated unless the new party is joined, or

(b) the relevant cause of action is vested in the new party and the plaintiff jointly but not severally, or

(c) the new party is the Attorney-General and the proceedings should have been brought by relator proceedings in his name, or

(d) the new party is a company in which the plaintiff is a shareholder and on whose behalf the plaintiff is suing to enforce a right vested in the company, or

(e) the new party is sued jointly with the defendant and is not also liable severally with him and failure to join the new party might render the claim unenforceable.

Order 20 Rule 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 writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.*

(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 be 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.*

26. The intended 2nd Plaintiff, as per the facts averred in support of the application, has an interest in the property as a legal entity set up *'by or on behalf of the First Defendant to manage, control and maintain the commercial and retail development on and to take a transfer of State Lease 16977'* and as the legal entity that now manages and maintains the Retail Centre and looks after the interests of the owners of the leases on the Centre.
27. The claim of the Plaintiff is premised on the issue of the lease over the 'car park' intended for the owners of the sub leases of the Denarau Retail Centre, being registered as a separate lease in breach of a condition in the original consent for approval granted for the development and now being sold to a third party (the 2nd Defendant).
28. As noted from the Statement of Claim of the Plaintiff, the Plaintiff's Caveat No. '737059 C' placed over the said part of land for the 'car park', forms only a part of the claim for the Plaintiff and it is clearly not the sole basis for the claim.
29. Having considered all affidavit evidence before this Court and the written submissions of the parties, this Court finds that the intended 2nd Plaintiff clearly has a cause of action against the Defendants and that the argument that it has *'no cause of action and/or no locus standi'*, to be joined in this case, in Court's considered view is erroneous and misconceived.
30. Court also notes that there is an argument forwarded in opposition of the application that pursuant to Order 15 Rule 6 (4) that an affidavit from the intended 2nd Plaintiff is a must and the failure of the Plaintiff to submit such an affidavit makes this application irregular.
31. However, the plain reading of Order 15 Rule 6 (4), makes it clear that it is a requirement intended only to a party, on its own motion, is attempting to intervene as

a Plaintiff in a proceeding and not when the existing Plaintiff in the matter is making an application to add a party as a Plaintiff to the proceeding. The requirement in this event is to have the consent of the party that is intended to be added as a Plaintiff, which in this case the Plaintiff has duly complied with.

32. Further, having carefully considered the alleged actions of the DTCP and NRAL, which had effectively led to the registering of a separate lease over the land for the 'car park' facility intended for the Denarau Retail Centre and the sale and/or transfer of the same to the 2nd Defendant, this Court finds that these alleged actions undoubtedly forms part of Plaintiff's claim and that the Plaintiff's claim would be rendered unenforceable if the DTCP and the NRAL are not joined as Defendants in the matter.
33. It is clear from the proposed Amended Statement of Claim, that the Plaintiff is not directly seeking relief against the decision and/or actions of the DTCP and the NRAL. The Plaintiff's claim is pivotally to reverse the registering of the separate lease over the 'car park' and to preserve the proprietary rights of the Plaintiffs over the said portion of land where the 'car park' facility is being made for the Denarau Retail Centre.
34. The argument that the Plaintiff's only remedy against the intended 7th and 8th Defendants should be an action in judicial review is therefore, in my view, misconceived. Plaintiff in this case is suing to protect its rights and interests under private law, derived as a result of the proprietary interests in the said land (the car park) and the liability as framed against the intended 7th and 8th Defendants in these proceedings, arises as a result of the consequences of the alleged actions of the DTCP and the NRAL, which the Plaintiff claims, to have threatened the peaceful enjoyment of the proprietary rights and interests of the Plaintiff.
35. It is perfectly clear from the proposed Amended Statement of Claim of the Plaintiff, that the liability of the intended 7th and 8th Defendants are based in private law, not severally, but jointly with the other Defendants and not as a direct challenge to the alleged actions and/or decisions of the DTCP and/or the NRAL. I therefore find that there is no requirement or necessity for the Plaintiff to have any recourse to the remedy outlined in Section 20 of the Town Planning Act and to have filed an action for judicial review as argued by the Defendants.
36. In view of the argument that the claim against the intended 7th and 8th Defendants being time barred, the Court finds that this issue is, in fact, covered under Order 15 Rule 6 (5) and (6) of the High Court Rules read in conjunction with Sec. 23 of the Limitations Act 1971. Section 23 of the Limitations Act reads as follows,

“23. Where an action has been commenced within any period of limitation prescribed by this or any other Act and, after the expiry of such period, it transpires that there has been misjoinder or non-joinder of any party to that action, the court may order that any other party may be joined in the action notwithstanding that the period of limitation has expired against that other party.”

37. Although the Plaintiff in his Supporting Affidavit has not specifically averred under which subsection of Order 15 Rule 6 that its proposed claim against the intended 7th and 8th Defendants are based upon, it is clear having considered the facts and submissions made on behalf of the Plaintiff, as a whole, that it falls under Order 15 Rule 6 (e) of the High Court Rules, since the intended 7th and 8th Defendants are being sued jointly with the other Defendants and is not also liable severally with them and that the failure to join them may render the Plaintiffs claim unenforceable.
38. This Court therefore finds that the Plaintiff’s application does not offend the principals as expounded in the case of *Fiji Development Bank v New India Assurance Company Ltd* (*Supra*), in joining a necessary party to the proceedings pursuant to Order 15 Rule 6 (5) and (6) of the High Court Rules.
39. As per the legal principles referred to and articulated in the case of *Prasad v Shaheed* (*Supra*), for consideration of an application for joinder pursuant to Order 15 Rule 6 (5) and (6) of the High Court Rules, I conclude that the Plaintiff has successfully satisfied this Court on the grounds of ‘Prejudice’ and ‘Necessity’.
40. However, when considering the question of ‘Length and reason for the Delay’ on the Plaintiffs’ part, I have no reservation in finding that the Court is not being satisfied of the same, as per the facts averred by the Plaintiff in his Affidavit in Support.
41. As per facts stated in the foregoing paragraphs of this ruling, it is evident that long before the inception of this case, the Plaintiff had been clearly aware of the interests of the intended 2nd Plaintiff in the matter and also of the actions and decisions of the intended 7th and 8th Defendants which had given rise to the Plaintiff’s proposed Amended Statement of Claim.
42. The Plaintiff’s explanation that ‘*It was during discovery stage in 2016 that certain documents were discovered wherein it became evident the role DTCP, NRLA and PDCOI played in these proceedings, and it has become necessary to join them to these proceedings*’ is not at all an acceptable or plausible reason for the delay.
43. The Court further finds, the Plaintiff’s averment to the effect that he had to thereafter wait till the delivering of a ruling on its application for the extension of the caveat and

injunction, before filing this application, is quite a hallow reason without any merit to explain the lengthy delay in bringing this application very late in these proceedings.

44. However, the necessity of adding the intended 2nd Plaintiff and the intended 7th and 8th Defendants to these proceedings, in my considered view, outweighs any prejudice caused to the Defendants as a result of the delay. The prejudice caused by the delay can certainly be remedied by way of an award of suitable costs to the Defendants. However, preventing the Plaintiff from adding to these proceedings, all necessary parties for the determination of the action, based only on the fact of the delay in making the application, shall be detrimental to the just and expedient determination of all matters relating to the claim of the Plaintiff and certainly would offend the interest of justice.
45. Accordingly, the Court concludes that the Plaintiffs application for joinder of the intended 2nd Plaintiff and the 7th and 8th Defendants must be allowed subject to costs to be summarily assessed by the Court.
46. In consequence, the Court makes the following final orders.
 1. The Summons filed by the Plaintiff on 19/10/2020 is hereby allowed subject to the following orders of the Court,
 2. The Plaintiff shall pay a cost of \$ 1000.00 to each of the Defendants in this case as summarily assessed by the Court, as costs of this application.
 3. The costs as ordered above (the total of \$ 6000.00) shall be paid within 07 days from the date of this Ruling. (That is by 09/08/2024)
 4. Plaintiff shall file and serve its Amended Writ of Summons and the Statement of Claim on all Defendants within 07 days. (That is by 09/08/2024)
 5. The 7th and 8th Defendants shall have 14 days from the date of service of the Amended Writ of Summons and the Statement of Claim to file and serve their Notice of Intention to Defend and Statement of Defence. (That is on or by 23/08/2024)
 6. If the need be, any other Defendant who wishes to file an Amended Statement of Defence may also do so within 14 days from the service of the Amended Writ of Summons and the Statement of Claim. (That is on or by 23/08/2024)

7. Plaintiff shall file and serve its Reply to the Statement of Defence of the 7th and 8th Defendants and/or the Amended Statement of Defence of any other Defendant, 07 days after. (That is by 03/09/2024)
8. 7th and 8th Defendants shall file and serve their AVLD 14 days after. (That is by 17/09/2024).
9. Discovery and Inspection of Documents shall be concluded 14 days after. (That is by 01/10/2024)
10. 14 days after for the Plaintiff to convene the PTC and file and serve PTC minutes. (That is by 15/10/2024)
11. In the failure of the Plaintiff to file and serve the PTC minutes by the above date, the PTC shall be deemed dispensed with.
12. Plaintiff shall in any event file and serve Order 34 Summons and the Copy Pleadings 07 days after. (That is by 24/10/2024)
13. In failure to comply with any of the above orders of the Court from No. 2 to 9 and 12, the defaulting parties' pleadings shall be struck out subject to a cost of \$ 5000.00 as summarily assessed by the Court.
14. This matter shall be for mention only on the next court date.



L. K. Wickramasekara,
Acting Master of the High Court.

At Suva,
31/07/2024.