

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 196 of 2018**

**BETWEEN** : **THE ATTORNEY-GENERAL for THE MINISTER OF  
INFRASTRUCTURE & TRANSPORT**  
**Plaintiff/First Respondent**

**AND** : **FIJIANA BUILDERS & CONSTRUCTION (FIJI)  
LIMITED**  
**First Defendant/Appellant**

**AND** : **ENGINEERED DESIGNS LIMITED**  
**Second Defendant/Second Respondent**

**Counsel** : **Mr AK Singh for Appellant/First Defendant**  
**Ms C Mangru for First Respondent/Plaintiff**  
**Ms Devi for the Second Respondent/Second Defendant**

**Hearing** : **22 November 2024**

**Judgment** : **4 December 2024**

**JUDGMENT**

**(Appeal from Master's Decision)**

[1] This is an appeal from the learned Master's decision striking out the First Defendant's counterclaim due to the First Defendant's failure to obtain leave under Order 77, rule 4(2) & (3) of the High Court Rules 1988 ('the Rules') before filing the counterclaim. The First Defendant seeks orders that the learned Master's decision is quashed and that it be granted leave to file the counterclaim.

[2] On 21 June 2024, I granted leave to the First Defendant to bring this appeal.<sup>1</sup> It is apparent from that decision that I considered that the appeal has merit and that there are compelling reasons justifying the Court granting the First Defendant leave to bring its counterclaim.<sup>2</sup> Nevertheless, the Plaintiff resists the appeal. It argues that the Court does not have discretion to grant leave to the First Defendant under Order 77, rule 4(2) & (3). In essence, the Plaintiff argues that a party is not permitted to apply for leave where that party has already filed their counterclaim.

### **Background**

[3] The relevant facts are set out in my earlier decision. For present purposes the following suffices:

<b>Date</b>	<b>Event</b>
3 July 2018	Plaintiff files its Writ of Summons
12 November 2018	First Defendant files its Statement of Defence and Counterclaim (but fails to seek leave as is required under O.77).
14 December 2018	The Second Defendant files its Statement of Defence.
7 March 2019	Plaintiff's counsel informs the First Defendant's counsel of the need for the First Defendant to seek leave to file its counterclaim against State.
5 July 2019	Plaintiff files an Amended Statement of Claim.
15 July 2019	First Defendant files a Statement of Defence and Counterclaim (once again it fails to seek leave before doing so).
7 August 2019	Plaintiff files a Summons to strike out the First Defendant's counterclaim for its failure to obtain leave under O.77.

<sup>1</sup> *A-G v Fijiana Builder & Construction (Fiji) Ltd* [2024] FJHC 395 (21 June 2024).

<sup>2</sup> See [20]-[22] of my decision dated 21 June 2024.

13 August 2019	First Defendant files a Summons seeking leave under O.77, r.4(2)(b) & (3) to bring its counterclaim against the Plaintiff.
1 February 2024	A Ruling is issued by the learned Master granting the Plaintiff's summons on the basis that the First Defendant is not permitted to seek leave under O.77 after already filing the counterclaim – the same is described by the learned Master as an abuse of the court process. The learned Master strikes out the First Defendant's counterclaim as well as dismisses its application for leave filed on 13 August 2019.

[4] The First Defendant appeals from the decision by the learned Master.

#### High Court Rules 1988

[5] Generally, a party must obtain leave of the court before that party can sue the State. With respect to counterclaims brought against the State, Order 77, rule 4(2) provides:

*Notwithstanding Order 15, rule 2, and Order 18, rules 16 and 17, no counterclaim may be made, or set-off pleaded, without the leave of the Court, by the State in proceedings against the State, or by any person in proceedings by the State -*

*(a) if the state is sued or sues in the name of a Government department and the subject matter of the counterclaim or set-off does not relate to that department; or*

*(b) if the State is sued or sues in the name of the Attorney-General.<sup>3</sup>*

[6] An application for leave must be made by summons.<sup>4</sup>

<sup>3</sup> My emphasis.

<sup>4</sup> Order 77, r.4(3).

- [7] The High Court has broad powers under Orders 2 and 3 to deal with breaches of the Rules. Order 2, rules 1 and 2 read:

*Non-compliance with rules (o.2, r.1)*

*1(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*

*(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such term as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.*

*(3) The Court shall not wholly set aside any proceedings or the writs or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed.*

*Application to set aside for irregularity (O.2, r.2)*

*2(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any documents, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.*

*(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.*

- [8] Order 3 provides the High Court with a discretion to extend time where a party has failed to comply with a time limit under the Rules. The discretion is available whether a party has or has not made their application before the expiry of the time limit.

[9] Master Nanayakkara offered the following helpful remarks with respect to the application of Order 2 in *Tabusiga v Nailesu* [2017] FJHC 125 (17 February 2017):<sup>5</sup>

*As a matter of construction of that rule [r.1], it is clear that, where there had been irregularity by non-compliance with the rules, the consequence would be that by reason of the irregularity, unless the Court so directed, the power of the Court, when an irregularity was noted, was either to set the proceedings aside or to amend them or otherwise deal with them as the Court thought fit. The content of Order 2 is designed to enable the Court, whenever faced with anything done or left undone in proceedings which constitutes a failure to comply with the requirements of the rules, to exercise the powers conferred by the rules without having first to decide whether the jurisdiction conferred by the rules applies at all.*

*Order 2, rule 2 describe the procedure when a Defendant wishes to apply to set aside proceedings. Such an application shall not be allowed unless made within reasonable time and before the party applying takes any further steps.*

*As I construe Order 2, r 1, from the moment a step in proceedings is tainted by irregularity through failure to comply with the rules the irregular step or document remains irregular inter partes until the matter has been brought before the Court and the Court has decided in which way to exercise the jurisdiction conferred by Order 2, r 1(2). Order 2, r 2 does not restrict the power of the Court in the sense of restricting its jurisdiction, and it does not have the effect of suspending the irregularity until the application under Order 2, r 2 is made. The purpose and effect of Order 2, r 2 is to prescribe the procedure if and when an opposite party decides to apply so that the Court on recognising the irregularity may exercise its powers under r 1(2) by taking the action of killing or curing the irregular proceeding.*

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<sup>5</sup> At 12.

*Where, in the course of proceedings, the court finds that a failure of the nature referred to in r 1(1) has occurred, which has not been waived by the other party either expressly or by implication, the court is given by r 1(2) a choice of courses to pursue at its own discretion, whether or not an application under Order 2, r 2 is before it. In such a situation, in the exercise of its discretion under r 1(2), it may either adopt the more draconian course of setting aside wholly or in part the proceedings in which the failure occurred, or the relevant step taken in those proceedings or the relevant document or order. Alternatively, it may make such order ... dealing with the proceedings generally as it thinks fit'. The last mentioned words are, in my opinion, manifestly wide enough to empower it to make a dispensing order waiving the relevant irregularity.<sup>6</sup>*

#### Decision

- [10] There is no dispute that the First Defendant is required under Order 77, rule 4(2)(b) to obtain leave to bring its counterclaim against the Plaintiff. Here, the First Defendant failed to do so on two occasions.
- [11] On the second occasion, the Plaintiff applied to strike out the First Defendant's counterclaim. A week later, the First Defendant finally made its application for leave. The learned Master determined that the timing of the application, after the counterclaim had already been filed, was an abuse of process. The Plaintiff argues that the learned Master was correct and that a party cannot seek leave of the Court under Order 77 where that party has already filed their counterclaim. More so in the present matter, as the orders sought by the First Defendant in its Summons seeking leave dated 13 August 2019 is not to file a counterclaim but rather *'to proceed with its counterclaim that has been duly filed on 13 July 2019'*.
- [12] Having carefully considered the Plaintiff's written and oral submissions, I am satisfied that the Court does have a discretion to grant leave to the First Defendant to bring its

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<sup>6</sup>My emphasis.

counterclaim against the Plaintiff. Any defects to the process can be remedied by the Court exercising its discretion under Order 2. The court has a wide discretion under this provision to fix any irregularities or non-compliance. In my decision granting leave to appeal, I found the following passage from the Supreme Court in *Extreme Business Solutions Fiji Limited v Formscaff Fiji Limited* [2019] FJSC 9 (26 April 2019) particularly instructive as to how the court is to exercise its discretion under Orders 2 and 3 of the Rules:<sup>7</sup>

*[65] I accept that there was in this case a failure to comply with a court order as to time but it is to be noted that the discretion to extend time, conferred by order 3 rule 4, contemplates that such breaches are not of themselves necessarily fatal, although one might observe that the position would be different in the case of an “unless” order. Nonetheless, what this all amounts to in this particular case is the refusal to extend time for service of a notice of appeal where service was a mere three days out of time, where the notice of appeal was filed in the time stipulated. where the judge had held that, prima facie, the prospective appeal had merit and where it is impossible to discern that Formscaff could have been in the least prejudiced by an extension. To refuse in these circumstances a three day extension of time seems to me to permit minor breach to trump merit and that must, I respectfully suggest, be inimical to the objective of the Rules.*

*[66] The guiding principle is this:*

*The object of the rule is to give the court a discretion to extend time with a view to avoidance of injustice to the parties... When an irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but in other cases the objection of lateness ought not to be listened to*

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<sup>7</sup> The Supreme Court was considering the Court's power under Order 3 to extend time.

*and any injury caused by delay may be compensated for by the payment of costs.*

*[67] The principles are more fully canvassed in Finnegan v Parkside Health Authority [1998] 1 All E.R. 595 in its reference to a number of other authorities and it is a judgment which merits study. The theme emerges that whilst the rules are devised to promote expedition and are requirements to be met, procedural default should not stand in the way of judgment on the merits unless the default causes prejudice which cannot be compensated by an award of costs. That said, an eye must be trained on the particular circumstances so as, for example, not to allow a wealthy plaintiff to flout the rules knowing that he has a deep pocket to meet such costs orders as might be made. "A rigid mechanistic approach is inappropriate." No doubt the length of the delay will be a relevant factor but generally the question is what the overall justice of the case requires.<sup>5</sup>*

[13] In similar vein, the Court of Appeal in *Singh v Bai* [2022] FJCA 18 (4 March 2022) offered these observations on how the High Court Rules ought to be applied:

*[26] ...the High Court Rules begin by providing for situations of non-compliance with the Rules and laying down the underlying theme that the inherent discretion of court is not to be lightly excluded. The framers of the Rules knew that on occasions of non-compliance with the Rules, it is vital to retain the discretion of court in the interest of justice.*

*[40] ... The power to grant an enlargement of time could be given by statute or contained in the Rules of court reflecting the inherent jurisdiction of court. Thus, it is correct that the HCR supplement the powers of court contained in statute and do not diminish such power.*

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<sup>5</sup> My emphasis.



...

[42]... *Ord. 59 cannot be construed in a manner that excludes the overarching principles laid down by the framers in the very creation of the Rules set out in the gateway provisions of the HCR. The underlying theme and overarching principle, to my mind is that the breach of even rules couched in mandatory language, are to be treated as curable irregularities, subject to the discretion of the court.*

...

[46] *Whilst there is no doubt that the HCR and all Rules of court are created for the smooth functioning of the system of justice, and to ensure certainty, transparency and clarity, too rigid an adherence to the Rules can result in unexpected, unintended and irreversible consequences. That is why in the Rules themselves are self-regulating and provide an internal remedy reserving to the judge, the necessary element of discretion to be applied on a case-by-case basis.*

[47] *The impact of the consequences of technical default may be totally disproportionate to the default, and result in irreversible consequences. This appears to be the reason why the framers of the HCR themselves provided in Ord.2...<sup>9</sup>*

- [14] While I agree with the Plaintiff that Order 77, rule 4(2) anticipates that a defendant will seek leave of the court before filing any counterclaim. I am satisfied that the court has power to remedy any defect with the process where it is in the interest of justice to do so. A party's failure to seek leave before filing a counterclaim is an irregularity that may be curable by the court where the facts of the case warrant the same.

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<sup>9</sup> My emphasis.

- [15] The Plaintiff has not provided a compelling reason as to why a failure to comply with Order 77 rule 4(2) is fatal, incapable of being cured by the court exercising its powers under Order 2. The Plaintiff argues that a party cannot make an application for leave after their counterclaim has been filed<sup>10</sup> and that the breach here by the First Defendant under Order 77, rule 4(2) is *'more than just an irregularity'*<sup>11</sup> but offers no reasons why non-compliance with Order 77 ought to be treated in this manner.
- [16] I have considered the authorities cited in the Plaintiff's written submissions but find that none are on point. The decision of *Hallacy v Pago* [2006] FJHC 161 (31 October 2006) in my view supports the First Defendant. In that case the defendant did not obtain leave to file its counterclaim against the State and nor was an application made after the counterclaim had been filed for leave. Neither party took issue with the matter and nor did the learned Judge. The Judge dismissed the defendant's counterclaim on the basis that the claim had not been made out, and not for any failure by the defendant to seek leave under Order 77, rule 4(2). If the Plaintiff is correct, that the failure by a party to seek leave before filing the counterclaim is fatal, then the court did not have any jurisdiction in *Hallacy* to consider the substantive merits of the claim – yet the court accepted that it did have jurisdiction.
- [17] The Plaintiff is critical of the wording of the First Defendant's summons of 13 August 2019 as the First Defendant does not seek leave to file its counterclaim but instead seeks leave *'to proceed with its counterclaim'* as already filed. I find that nothing turns on the wording of the First Defendant's summons. The Court has power to grant leave after the counterclaim has been filed or to grant leave before the counterclaim is filed. It will simply depend on the facts of a particular case which order is to be made.
- [18] Finally, I am surprised that the issue in this appeal has not previously arisen. Neither counsel have been able to find any authorities on point with respect to a failure to obtain leave under Order 77, rule 4(2). I suspect that the issue is not new and that the matter has simply been remedied by the court exercising its inherent jurisdiction – this would be in keeping with the outcome in *Hallacy v Pago* (supra).

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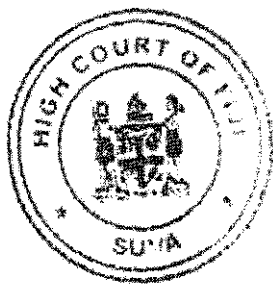
<sup>10</sup> Para 5.7 of the Plaintiff's written submissions.

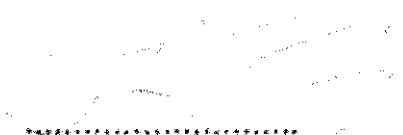
<sup>11</sup> Para 4.3.

## Orders

[19] My orders are as follows:

- i. The appeal succeeds and the learned Master's ruling of 1 February 2024 is set aside.
- ii. The Plaintiff's Summons of 7 August 2019 seeking to strike out the First Defendant's counterclaim is dismissed.
- iii. The First Defendant's Summons of 13 August 2019 seeking leave under Order 77, rule 4(2), to bring its counterclaim against the Plaintiff is granted.
- iv. The Plaintiff is to file its Statement of Defence to the First Defendant's counterclaim within 21 days and the First Defendant is to file its reply within 14 days thereafter.
- v. There will be no order as to costs.



  
D.K.L Tuiqereqere  
JUDGE

### Solicitors:

Office of the Attorney-General's Chambers for the Plaintiff  
A.K. Singh Law for the First Defendant  
Lajendra Lawyers for the Second Defendant