

IN THE HIGH COURT OF FIJI

IN THE CENTRAL DIVISION

CIVIL JURISDICTION

Civil Action No. 363 of 2020

BETWEEN: TEBARA TRANSPORT LIMITED

PLAINTIFF

AND: HOME FINANCE COMPANY LIMITED

DEFENDANT

For the Plaintiff : Mr Naidu R
For the Defendant : Mr Lajendra K
Date of Hearing : 4 December 2024
Date of Decision : 7 February 2025
Before : Waqainabete -Levaci, S.L.T.T, Puisne Judge

RULING

(Application for Leave to Adduce further Documents at Trial)

BACKGROUND

- 1.1 The Applicant/Defendant has filed an interlocutory summons during the pendency of their Trial seeking leave to adduce additional documents and calling of new witnesses or recalling of witnesses both for them as well as for the other party.
- 1.2 The current case before the court stems from a claim by the Respondent/Plaintiff against Applicant/Defendant for over paying their business loan arising from an alleged lower interest rate offered on one of their loan agreements.

- 1.3 This has been opposed and denied by the Applicant/Defendant who alleges arrears in loan and the matter is still pending in Trial.

2 AFFIDAVITS AND SUBMISSIONS

- 2.1 In their Affidavit, the Applicant/Defendant seeks to discover further additional documents relating to the applicable interest rate for Loan Account 5551L10.3.
- 2.2 These include letters and email exchange between the parties during the said loan agreement, email exchanges on cashflow and profit forecast, lawyers exchange of emails.
- 2.3 The documents also are from the Respondent/Plaintiff and should be within their knowledge.
- 2.4 The documents were retrieved from the Applicant/Defendant's archives after having conducted searches.
- 2.5 In response, the Respondent/Plaintiff contends the application on the basis that the documents were in the defendants possession and should have been produced at discovery, the application is a late attempt to adduce additional documents when it is only the re-examination of the defence witness and such an application is prejudicial to the plaintiff to delay the Trial in order to strengthen their case.
- 2.6 In reply, the Applicant/Defendant deposes that the documents are evidences to enable the Court to properly adjudicate on the matter.
- 2.7 They further depose that the documents had been archived in Banks records and were not traced nor located at discovery stage and only after numerous attempts were retrieved.
- 2.8 The Respondent/Plaintiff filed written submissions

3 ADDUCING EVIDENCE AT TRIAL AND ANALYSIS

- 3.1 The discretionary power of the Court to grant leave to produce documents is provided under Order 24 Rule 16 of the High Court Rules which states:

16-(1) If any party who is required by any of the foregoing rules, or by any order made thereunder to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any provision, to rule 3 (2) and 11 (1)-

“(a) that party shall not be entitled subsequently to produce a document in respect of which default was made without leave of the Court; and

(b) the Court may make such order as it thinks just including, in particular, an order that the action be dismissed, or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.”

3.2 Given that this is a leave application, in order to grant or refuse an application to adduce a document at trial stage, the Court must carefully consider the basis of the application and the reasons why the document was not adduced earlier at discovery stage. The relevance or credibility or authenticity of the document will be determined at trial and need not be dealt with at this stage.

3.3 I am mindful of the principles of discovery and the fact that leave to adduce fresh evidence even where Counsel has closed his case may be made, particularly out of inadvertence as long as there is no prejudice to the other party (Attorney General -v- Anand Prasad (1975 21 FLR 120) which cited with approval Murray -v- Figg [1975] ALR 612). The requisite requirements to determine whether or not to admit documents is:

- (i) It is not prejudicial to the other party;
- (ii) In the interests of justice.

3.4 Reference was made to Beamish -v- the Queen [2005] WASCA 62 (1 April 2005) which can be distinguished in principle and facts from this case as that case was a criminal matter by way of an Appeal by reference from Attorney General on the exercise of his powers to refuse Prerogative of Mercy. Secondly the question in consideration was whether fresh evidence could have been obtained on Appeal after trial or hearing.

3.5 In the case of Vitifoam Limited -v- Fred Bryson CA 16 of 1984 which Counsel for the Plaintiff had graciously submitted, and argued stemmed from the decision at p. 10 which refused to grant the application to adduce further documentary

evidence on the basis that the applicant had 10 years to find and adduce such documents. Furthermore the application would prejudice the other party who had no knowledge of its existence until now.

3.6 The Court considered the following requisites for the purpose of determining leave should be granted for adducing additional documents prior to the end of trial as follows –

- (i) Whether there is a genuine reason for the failure to discover the document during discovery;
- (ii) Whether to adduce the document is prejudicial to the parties;
- (iii) Whether it is in the interests of justice.

3.7 In the Affidavit and submissions by the Applicant/Defendant, they explain that the documents were unable to be retrieved until recently from the bank's archives. That the documents were initially part of Habib Bank Ltd and were later transferred both physically as well as electronically to the Applicant/Defendants bank and were kept in the archives hence the reason for the delay to retrieve the documents.

3.8 The Respondent/Plaintiff deposed that the documents was only adduced late at trial on the advent an earlier leave to adduce fresh evidences on the eve of trial. Since Summons for Directions were filed and Orders given by the Master in 2021, the Applicant/Defendant has failed to make discovery of the documents until the eve of trial. Applicant/Defendant had heard the evidences of the Plaintiff and is now seeking to adduce additional evidences at this late stage.

3.9 The Court considered this line of objections and the reasons of the Applicant/Defendant. The objections are by book, true. However, the court must exercise its discretion to determine whether the failure to adduce evidence during discovery is substantial. The Court must consider the documents intended to be adduced. This will also then determine whether the parties are prejudiced if the leave was granted.

3.10 The documents pertain to electronic mails between the parties regarding the loan offers, agreements and the interest rates during the period in which the alleged reduced interest rate in the loan offer and agreement were issued.

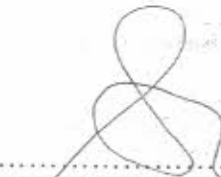
3.11 Despite the Respondent/Plaintiff arguing in submissions of its irrelevance, these issues of objections should have been deposed of as evidence in the Affidavit by the deponent as it touches on his understanding of the correspondences the company was involved in. Their failure, causes their objections to hold no water.

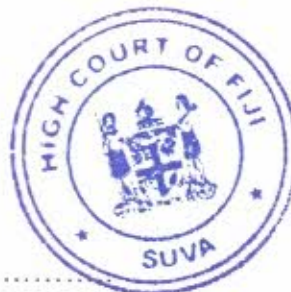
- 3.12 However for fairness sake, the Court takes into consideration as to whether the there is relevance. The weight the court gives to its credibility, relevance and admissibility will be determined at the end of trial.
- 3.13 The Court finds that there was genuine reasons why the documents were not discovered at Discovery stage.
- 3.14 A party's inability to discover the document should not be considered failure to comply with Masters Directions if the party had exhausted all avenues to forward their best documentary evidences which were available to them for discovery purposes.
- 3.15 The Court finds that the parties will suffer some form of inconvenience but this will not cause any substantial prejudice as the documents are familiar to both parties, being part of their correspondences regarding the loans.
- 3.16 There is nothing precluding the adducing of new evidences during the pendency of the trial as long as the court grants leave.
- 3.17 For the interests of justice, it is for all intents and purposes important that such documents be adduced. The veracity of the documents will be determined at trial.

5.0 Orders

5.1 The Court Orders as follows:

- (i) Court grants Leave to Adduce further Documents;
- (ii) No Order as to costs.


Senileba L.T.T. Waqainabete-Levaci
Judge



7 February 2025

Counsel for Applicant: Messrs Naidu Law, House of Lords, Cumming St, Suva
Counsel for Defendant: Messrs Lajendra Law, 74 Ratu Sukuna Road, Nasese.