IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO: ABU 0034 OF 2011
(HIGH COURT CIVIL ACTION NO. 220 OF 2010)

BETWEEN	:	**NATIONAL BANK OF FIJI**
		Appellant
AND	:	**SACHIDA NAND NAICKER**
		Respondent
CORAM	:	**Lecamwasam, JA** **Kotigalage, JA** **Amaratunga, JA**
COUNSEL	:	**Ms. B. Narayan for Appellant** **Mr. S.K.Ram and Mr. N.R.Padarath for Respondent**
Date of Hearing	:	**13 September 2013**
Date of Judgment	:	**08 October 2013**

JUDGMENT

Lecamwasam, JA

[1] This is an appeal filed by the plaintiff /appellant against the order of the learned High Court Judge at Lautoka dated 6th may 2011. The defendant in this case sought to amend the defence statement of claim by the addition of nine new paragraphs thus introducing a new counter claim, which was strongly opposed to by the plaintiff and finally the learned High Court Judge made order in allowing the amended statement of defence except paragraphs 7 and 14. Being aggrieved by the above order the plaintiff/appellant has filed this appeal on ten (10) grounds of appeal viz:

1. *The learned Judge erred in law and fact in allowing the amendment sought by the Respondent to introduce a new counter-claim in his Statement of Defence.*

2. *The learned Judge failed to appreciate that the proposed amendments sought under paragraph 8 and the corresponding paragraphs of the proposed Statement of Defence were interrelated with the amendments proposed under paragraph 7 and 14 and erred in fact and in law in allowing the amendments sought in the former when she had disallowed the proposed amendments in the latter.*

3. *The learned Judge erred in law and in fact in holding that there is an issue to be determined whether the Appellant had assumed payment of the insurance premiums by its conduct contrary to the provisions of paragraph 3 of the Mortgage.*

4. *The learned Judge erred in fact and in law in holding that the delay of including the amendment of the counter-claim had been explained by the Respondent when in fact the Respondent had failed to satisfy the truth and/or substantially of the proposed amendment and also in sufficiently and/or reasonably explaining the delay.*

5. *The learned Judge erred in law and in fact in holding that permitting the proposed amendment by adding the new counter-claim would not prejudice the right of the Appellant.*

6. *The learned Judge erred in fact in holding that the evidence before her did not disclose whether the lease was renewed or why the Appellant had accepted such a land as security when there was sufficient evidence in relation to this in the form of Affidavit evidence and the parties' Bundle of Documents filed in this action.*

7. *The learned Judge erred in not holding that the amendment sought by way of the new counter-claim is statue-barred and failed to properly consider the correct principles of law on this issue when exercising her discretion to allow the said amendment.*

8. *The learned Judge erred in law and in fact in finding that if the cause of action in the proposed counter-claim is based on the terms and conditions of the Mortgage, then the limitation period is 20 years from the date when the cause of action accrued.*

9. *The learned Judged failed to properly consider and reject the Respondent's argument that the proposed counter-claim is not time barred as the action falls under Section 25 of the Limitation Act.*

10. The learned Judge erred in law and in fact in permitting the amendments sought in paragraph 8 and the corresponding paragraphs of the proposed Statement of Defence on the basis that Her Ladyship would be pre-judging the issue of limitation on the available evidence and that the same should only be determined after a due hearing of all the evidence.

[2] The facts in brief are as follows:

(i) The defendant applied for a loan of FJ$20,000 from the plaintiff bank which was approved and according to the Plaintiff, the defendant applied for a further loan of FJ$6000 but only FJ$2000 had been approved. However, the defendant admits having taken FJ$20,000 but disputes the receipt of latter FJ$2000.

(ii) The defendant's repayment of instalments had been extremely irregular and unsatisfactory. On 11th October 2000, the defendant's house was destroyed by fire, by then his insurance cover over the house had been lapsed for not paying the insurance premiums on time.

(iii) The defendant alleges that he had been of the belief that the premium was paid by the bank. As the plaintiff bank had failed to pay the premium on time the defendant now claims FJ$40,000 from the bank by way of the counter claim.

[3] The learned High Court Judge had allowed the amended defence statement in regard to the payment of insurance premium as stated in paragraphs 8, 9, 10, 11, 12, 13 and 15. The instant appeal filed by the plaintiff appellant is against the above order of the learned High Court Judge.

[4] According to the approved application for the loan under the caption of 'security' it is stated that 'the bank would require the following securities to accommodate this borrowing:

- 1st Registered Mortgage over CL 8249

- Insurance over above'. (Page 48)

[5] Hence it is clear that the defendant was required to agree to register the mortgage and insure the property, to be eligible to receive the loan and he agreed to pay FJ$400 per month with effect from one month after draw down. He had accepted the above terms and conditions by placing his signature on 12th November 1997 (as per pages 48, 49).Therefore he became obligated to repay at the rate of FJ$400, to insure the land and to enter into a mortgage, all of which he willingly agreed to.

[6] In addition to the above, clause 3 of the mortgage bond also requires the defendant to insure the mortgage property and to pay duly and punctually all the premiums in respect of the insurance. Consequently it is crystal clear that it was the duty of the defendant to pay all the premiums. The position of the defendant is that as the plaintiff had paid the premiums the defendant was under the impression that the plaintiff had taken over the payment of insurance premium. In the same breath he says that he became aware of the payment of insurance premium being paid by the plaintiff bank only at the point when the first witness for the plaintiff was in the process of giving evidence. As such he moved to amend the statement of defence by the addition of 9 new paragraphs.

[7] Order 20 Rule 5 (1) and (5) of the High Court Rules provide:

> *"5..-(1) Subject to Order 15, Rule 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.*
>
> *5..-(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".*

[8] Under Order 20/5-8/6 of the White Book (1988 Supreme Court Practice) states that:

> *"It is a guiding principle of cardinal importance on the question of amendment that generally speaking, all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defects or error in any proceedings." (see per Jenkins L.J in R.L.Baker Ltd v Medway Building & Supplies Ltd [1958] 1 W.L.P 1216, p1231; [1958] 3 All E.R.540, p.546)"*

[9] In Ketterman v Hassel Property (1997) 1 A.C. 189 at 220 Lord Griffiths in the House of Lords said:

> *"Whether an amendment should be granted is a matter of the discretion for the trial judge and he should be guided in the exercise of his discretion by his assessment of where justice lies. Many of diverse factors will bear upon his discretion. I do not think it possible to enumerate them all or wise to attempt to do so."*

Therefore it is clear that the court has a discretion in allowing an application for amendment at any stage of the trial. The decision is Ketteman v Hassel Property (supra) was followed in Ahmed v Ibrahim [2002] FJCA 74; ABU 008 1U.2005S (29 November 2002)

[10] As is apparent from the above judicial dicta it is the matter of discretion of the judge to allow an amendment or not. However the amendment ought to be made for the purpose of determining the real question in controversy between the parties. In the instant case the real issue is whether the defendant repaid the loan amount or not and not the matter stated in the counter claim. The plaintiff had filed this action to recover the loan money.

[11] The main argument of the defendant appears to be that since he was not aware of the payment of the insurance premium by the bank until the plaintiff witness gave evidence, it was the responsibility of the plaintiff to pay the insurance premium and to keep the policy alive. As the plaintiff has failed to do so the plaintiff is estopped from denying responsibility and the defendant moved court to amend the statement of defence on that ground. **At the argument stage, the defence counsel stated that he is relying only on defence of estoppel in this case.**

[12] In order for estoppel by representation to operate, there must have been representation made by the person to be estopped to the person claiming the benefit of estoppel. For estoppel to be enforced the representation must be communicated to the relevant person.

[13] On perusal of the affidavit of the defendant dated 23rd February 2011, the defendant himself admits at paragraph 19 that the bank had not disclosed to him that the bank had taken steps to pay the premium on behalf of the defendant. Therefore, the defendant would not have known about the payments made by the bank and presumably there had been no communication thus there cannot be any estoppel by representation in the absence of communication.

[14] In view of the above, I am of the view that the defendant cannot take refuge under estoppel by representation. Any assurance, promise or representation must be communicated to relevant party and then only that party can take the defence of estoppel. The position of the defendant is that he was not aware of the above payment of premium until such time as the first witness of the bank gave evidence. Since this was the case he moved to file an amended statement of defence.

[15] On a further perusal of defendant's documents in a letter written in March 2000 (date is not clear – page 147) written by the Customer Services Officer to the defendant which states:

> *"Enclosed please find your statement which shows your current balance due. This balance represents the renewal premium for your insurance policy which expired last month.*
>
> *To ensure that you were not left without insurance protection we automatically renewed your cover for you on the expiry of your policy. You have therefore enjoyed continuous cover since the expiry date. The premium amount due should not be paid, as it did become due on the expiry date.*
>
> *Please arrange for premium payment by 29/3/2000. We will maintain your cover until 4 pm on 29/3/2000 but if we have not heard from you or received payment by then we will cancel your policy xdf 001".*

[16] The positions reflected by this letter is to the effect that although the premium was paid by the bank, the bank expected the defendant to reimburse the said payment. This illustrates that the bank had paid the premium in order to keep the policy alive but not as a sign of continuous responsibility to make payments. Having paid the

premium, the bank insisted the defendant to reimburse the premium before 29th March 2000.

[17] This letter negates the position of the defendant that he was unaware of the responsibility of the bank until such time had the plaintiff's witness revealed that fact in evidence. Therefore he was not taken unawares as he claims when the witness said that the bank made some payments. Hence the defendant had misrepresented and misled the court of his awareness or lack thereof of the payments of premiums made by the bank and by moving court to amend the statements of defence. He had been blowing hot and cold.

[18] The defendant had not been regular in the payment of the instalments or premium which prompted the plaintiff bank to send reminders and default notices very frequently. By a letter dated 21st June 2000, the defendant had requested the plaintiff bank to pay the insurance premium. This was a considerable time before the fire destroyed the house. The bank by letter dated 4th July 2000, informed the defendant to arrange insurance renewal and to clear the arrears which is indicative of the lack of intention on the part of the bank to pay the premium. The defendant was under an obligation to pay the premiums at least after receiving March 2000 and 4th July 2000 letters he should have known that obligation to pay insurance premium was still with him.

[19] In addition to the failure to pay loan instalments regularly he had not taken any step to pay the premiums except the initial premium, thus leaving behind him an appalling record. In spite of this background he was able to persuade court to grant him permission to amend his statement of claim on the basis that it was through the first witness of the plaintiff that he was availed of the fact of the payment of the premium by the bank. Whereas the defendant knew that it was his obligation to pay the premiums as evident by the above correspondence. Had the court been more cautious, court would not have granted permission to amend the defence statement.

[20] All the above correspondence had been exchanged between the parties prior to the 17th September 2003. All these correspondence have taken place before 17th September 2000 that is before the defendant filed his original statement of defence. Therefore the defendant could have incorporated all these facts (which were or ought to have been within his knowledge) in his original statement. He has not given a reasonable and plausible explanation as to the delay in seeking an amendment. The sole reason he had relied on as explanation for such a delay is the revelation of some new facts in the evidence of the first witness of the plaintiff.

[21] As I have already observed these 'new facts' were within the knowledge of the defendant at the time of filing the original statement of defence. Although the learned High Court Judge was satisfied with the explanation given, I am unable to concur with the conclusion of the learned High Court Judge on this point. The defendant had been dormant for 8 long years before he made an application to amend the statement. The White Book (1988 Supreme Court Practice) states under Order 20/5-8/10:

> *"There will be difficulty however, where there is ground for believing that the application is not made in good faith. Thus, if either party seeks to amend his pleading, by introducing for the first time allegations of fraud, or misrepresentation or other such serious allegation, the Court will ask why this new case was not presented originally; and may required to be satisfied as to the truth and substantiality of the proposed amendment (Lawrence v Norreys (1890) 38 Ch D.213; see Judgment of Stirling J.p.221, and of Bowen L.J. p. 235."*

[22] There is no doubt that the pleadings can be amended at any stage of the trial. However in the instant case the amendment was sought after fourteen (14) years after the institution of the action and eight (8) years after the original statement of defence was filed. All these facts were available and known to the defendant at the time of filing his original statement of defence. Hence the defendant is not only guilty of laches but also such long delay is prejudicial to the rights of the plaintiff bank. As stated under Order 20/5-8/20 of the White Book (1985 Supreme Court Practice) sub-headed "Delay" it is stated that:

> *"A slight delay is not sufficient ground for refusing leave. But if an application which could easily have been made at a much earlier stage of the proceedings be delayed till after evidence given and a point of law argued, leave may be refused (James v. Smith) [1891] 1 Ch. 384..."*

[23] Therefore after such long delay reason for which is not satisfactorily explained, I cannot allow the application for an amendment and thereby open floodgates. The defendant's application is frivolous, vexatious and prejudicial to the rights of the plaintiff and not filed in good faith.

[24] Therefore the appeal of the plaintiff appellant is allowed. The learned High Court Judge's order dated 6 May 2011 is set aside as far as the order relates to paragraphs 8,9,10,11,12,13 and 15. The defendant respondent shall pay by way of costs of this appeal, a sum of $2000 to the plaintiff appellant.

Amaratunga G, JA

[25] I had the opportunity of reading the judgment of Lecamwasam JA and agree that the appeal should be allowed and the proposed amendment which sought an introduction of counterclaim should be struck off with costs in favour of Plaintiff – Appellant as stated therein. The facts of the case and grounds of appeal are stated in the said judgment and I do not wish to reiterate them here.

[26] This appeal is against the "interlocutory judgment" of the learned High Court Judge allowing certain amendments proposed by the Defendant – Respondent to introduce a counter claim based on estoppel. The Plaintiff-Appellant appealed against this decision. The learned High Court Judge had under the Legal Matrix summarized the issues before her as follows:

LEGAL MATRIX

[6] The amendment seeks the introduction of nine new paragraphs to the existing Statement of Defence, including the addition of a counter claim. The cruxes of the amendments are premised on two issues viz:

i) Whether the plaintiff induced the defendant to execute the mortgage over his Crown Lease no. 8249 without explaining the contents.

ii) Whether the plaintiff by its action and /or conduct had agreed and represented that the plaintiff would undertake the payment of insurance premiums over the property secured.

[7] The plaintiff objects to the proposed amendments on two grounds. Firstly, that they are prejudicial to the rights of the plaintiff; and secondly, that the proposed amendments attempt to introduce a new cause of action, which is barred by the Limitation Act.'

[27] The learned High Court Judge had rejected the amendment that dealt with the issue (i) of the Legal Matrix in her judgment, and there is no appeal on the said determination. While disallowing the said amendments dealing with issue of inducement and lack of explanation of the contents of the mortgage the learned High Court Judge held,

'[18] The defendant is a businessmen who had made an application to obtain a loan from the plaintiff's bank. It is common knowledge that the bank requests security from its customers when loans are processed. It is apparent that the defendant had informed of his assets to the bank and offered the crown lease as security. The real controversy between the parties is whether the plaintiff paid $20,000 and $2000 subsequently to the defendant and did the defendant repay the sum. The defendant admits that he received the $20,000 but was unable to repay it due to business downturn. It appears that there is an issue as regards the payment of $2000, which the court would have to determine after considering the evidence. Since the defendant admits receiving the loan of $20,000, the

> issue whether the defendant was induced to sign the mortgage without explaining the contents would anyway become only academic. I am therefore of the view that the proposed amendment is not necessary for this court to determine the real issue before court.'
>
> [19] Moreover, this is the foremost defence of the defendant. In my mind, the aforesaid conduct of the defendant, together with unexplained delay in alleging a vital defence such as inducement at the very earliest opportunity, do not justify to be introduced as an amendment to the Statement of Defence at this stage of the trail. Clearly this is a defence, if true should have been taken in the Statement of Defence and not as an afterthought after 8 years. In the circumstances, I am of the view that the proposed amendments, if allowed, at this stage of the trial would in fact cause injustice to the plaintiff and would be prejudicial to the plaintiff's case.
>
> [20] Accordingly, I do not permit the proposed amendment at paragraph 7 and 14.'

[28] There is no appeal against the said part of the determination, but the counsel for the Plaintiff-Appellant stated that same reasons should apply to the other part of the determination regarding the amendment which was allowed by the High Court judge, where the Defendant-Respondent was seeking to introduce a counterclaim against the Plaintiff – Appellant based on estoppel. I do not think that the said reasons in toto can be applied to the amendment based on counterclaim, but the determination on delay and injustice to the Plaintiff – Appellant are applicable to the introduction of counterclaim based on estoppel. The issue (ii) of the Legal Matrix of the said judgment states as follows

> 'SECOND ISSUE – Did the plaintiff by its action and /or conduct had agreed and represented that the plaintiff would undertake the payment of insurance premiums over the property secured?
>
> [21] Paragraph 3 of the Mortgage required the defendant to insure the building against destruction or damage by fire, storm and earthquake. On 11 October 2000, a fire destroyed the

building, which was secured by the mortgage. The insurer, Tower Insurance refused to honour the claim as the premium was in arrears.

[22] Paragraph 3 of the Mortgage requires the defendant to insure the building. However, when the plaintiff's witness gave evidence, it revealed that the plaintiff had paid or attempted to pay the 2nd and 3rd insurance premiums. The defendant claims he was unaware of the 'insurance requirement' and in fact was informed that insurance premiums will be paid by the defendant. (paragraphs 10 and 11 of the affidavit).

[23] The evidence thus produced before me reveals that the defendant paid the first premium and the bank paid or attempted to pay the other two premiums. **There appears to be an issue whether the plaintiff had assumed payment of the insurance premiums by its conduct contrary to the provisions of paragraph 3 of the Mortgage.**

[24] As I have reasoned out earlier, the amendments are permissible at any stage of the trial (sic). The proposed amendment on 'insurance', seeks to introduce a new counter claim based on the liability of payment of the premium. If the insurance was operative the defendant would have been entitled to the insured sum of $40,000.00 when the building was destroyed by fire. The plaintiff admits making the payments, but explains that it was made on behalf of the defendant and on his request. The untested affidavit evidence of both parties discloses that the last insurance premium was attempted to be made without the knowledge of the defendant. **The defendant states that he was unaware of the payments of the two insurance premiums and heard it for the first time when the plaintiff's witness gave evidence in court. The delay of including the amendment of the counterclaim is therefore explained.** In my mind, this is a justifiable issue, which needs to be examined by court after hearing all evidence. In the circumstances, I am of the view that permitting the said amendment would not prejudice the rights of the plaintiff.' (emphasis added)

[29] Defendant-Respondent was fully aware of the payment of insurance premiums by the Plaintiff. There were ample evidence that not only that Defendant-Respondent was aware, but also had requested the Plaintiff to pay insurance premium in year 2000, alleging financial difficulties he was facing at that time. The Plaintiff had refused the request promptly.

[30] There is no issue of any legally binding representation by conduct of the Plaintiff - Appellant due to payments of insurance premiums in year 1999 and 1998, when the clause 3 of the mortgage is operative. The Plaintiff had also communicated to the Defendant –Respondent that the request for payment of the premium for insurance would not be acceded, in year 2000. These are all facts that can be easily deducible from the documents that were before the court. As stated in the judgment of High Court, the Plaintiff-Appellant had attempted to pay the insurance premium in year 2000, but this attempt creates no obligation on them to pay it, though they had done so in 1998 and 1999. The contention of the Defendant – Respondent which is based on their counterclaim cannot hold water considering the communications between the parties.

Communications regarding the insurance

[31] On **10th March, 2000** (page 81 of the record, Document No 17 of Plaintiff's Bundle of Documents- Tab 4 of record) the insurance company had written a letter to the Respondent regarding the non payment of the premiums for the Policy Xdf001 and stated

> 'Please arrange for premium payment by 29/03/2000. We will maintain your cover until 4 pm on 29/03/2000 but if we have not heard (sic) from you or receive payment by then we will cancel your policy xdf001'

[32] The above mentioned letter was copied to the Plaintiff-Appellant as well, and they were aware of the non-payment of the premium by the Defendant-Respondent as well. When the premium was not paid by the deadline, the Defendant – Respondent knowingly, took the risk, and now cannot absolve from that. Since, this letter was copied to the Plaintiff, they were aware of the dead line, too. The Defendant-Respondent waited till the expiration of the dead line set by the insurance company and only 21st June, 2000 he made a request to the Plaintiff.

[33] On **21st June, 2000** the Defendant-Respondent had requested the Plaintiff-Appellant to pay the premium of the insurance cover due to financial difficulty he was encountering at that time. (This letter is found contained in document No 18 in the Plaintiff's Bundle of documents) Tab 4 of Record. It stated

> 'We would also appreciate if the insurance for the house and the motor vehicle be paid by the bank and to be debited into our respective accounts.
>
> **We hope our humble request as above would be considered kindly by your bank**.' (emphasis is mine)

[34] The 'humble request' of the Defendant- Respondent to the Plaintiff appellant was to pay the insurance premium allegedly due to the crisis in their business. If there was any legally binding conduct on the part of the Plaintiff, there cannot be a 'humble request' in June 2000, long after the expiry of ultimatum given by the insurance company through its communication in March, 2000. The Plaintiff-Appellant promptly replied to 'humble request' from a letter dated **4th July, 2000** which is contained in Plaintiff's Bundle of Documents No 19 (Tab 4 of the Record). In this letter the Plaintiff had reiterated the Respondent's commitment to pay the insurance premiums and had also given ultimatum to settle the insurance premiums. The said letter dated **4th July, 2000** stated as follows

> **'We are concerned that arrears on account has increased and that insurance over your house has expired.**
>
> **Despite our previous reminders** you have failed to honour your commitments.
>
> Accordingly we now give you this final opportunity to arrange insurance renewals and clearance of arrears within seven (7) days from the date of this letter.'(emphasis is added)

[35] According to the above letter the Plaintiff - Appellant had not acceded to the request of the Defendant-Respondent to pay the insurance premium for year 2000, but had stated that they had even reminded on an earlier occasion on non – payment of insurance premiums and the expiration of the said insurance policy, presumably in March, 2000 to the Defendant – Respondent and had also demanded him to settle the insurance premium within 7 days! So, in such a situation there is no room for estoppel to operate as alleged by the counsel for the Defendant-Respondent. These facts were all deducible from the documents already disclosed by the Plaintiff – Appellant to the court at least 5 years before the trial! The said documents were revealed by the affidavit verifying plaintiff's list of documents as far back on 18th May, 2004. The said affidavit verifying the Plaintiff's list of document was contained in Tab 3 of the record, which was part of Copy Pleadings filed on 19th December, 2006. So, the Defendant had notice of these letters at least twice, in this action, before the trial, in 2004 (when the affidavit verifying the Plaintiff's documents were disclosed) and also again in 2006 when the Copy Pleadings were filed, and it was incorrect to state that Defendant – Respondent became aware of the payments of the insurance premiums by the Plaintiff at the trial.

[36] The counsel for the Respondent state that his entire counter claim was based on estoppel, upon the payment of insurance payments by the Plaintiff-Appellant in previous years. The Court is entitled to have regard to the merits of the case in an application to amend if the merits are readily apparent and are so apparent without prolonged investigation into the merits of the case (see King's Quality Ltd v A.J. Pants Ltd [1997] 3 All E.R. 267).

[37] In Ketteman and Others v Hansel Properties and Others [1987] A.C 189 at p220 Lord Griffiths stated as follows (regarding the amendment)

> *'This was not a case in which an application had been made to amend during the final speeches and the court was not considering the special nature of a limitation defence. Furthermore, whatever may have been the rule of conduct a hundred years ago, today it is not the practice invariably to allow ad defence which is wholly different from that pleaded to be raised by amendment at the end of trial even on terms that an adjournment is granted and that the defendant pays all the costs thrown away. There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.*
>
> *Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view judge is entitled to weigh in the balance the strain the litigation imposes on litigants.'*

[38] The above statement is apt for this action, and the discretion should be exercised in favour of the Plaintiff-Appellant. The proposed counter claim of the Defendant-Respondent is completely new position, when they had ample notice of all the documents relating to the payment of the insurance premiums. The said counterclaim is not any clarification of existed defence, but a complete wholly different from what was pleaded. The defence of estoppel is raised for the first time, from the already disclosed documents at least 5 years before the start of trial and no explanation is given for the delay in the affidavit in support. The justice lies heavily in favour of not allowing the counter claim based on estoppel.

[39] In this case the communications between the parties were disclosed long before the trial and now the Defendant-Respondent is relying on selective 4 communications

between the Plaintiff – Appellant and insurance company in support of their counter claim. These communications were not even copied to the Defendant-Respondent hence cannot be a basis for estoppel. The Defendant-Respondent in his affidavit in support of the amendment selectively annexed 4 communications between the insurance company and the Plaintiff – Appellant, without referring to any direct communications between the Plaintiff – Appellant and Defendant – Respondent regarding the payment of insurance premium relating to year 2000. The totality of the documents disclosed by the Plaintiff regarding the payments of insurance premiums indicate a clear position that the obligation to pay the premium was with the Defendant and it had not changed despite previous payments by the Plaintiff in 1999 and 1998.

[40] Under Order 20/8/6 of the Supreme Court Practice of 1999 under the heading '**General principles for grant of leave to amend**' at page 379 it is stated that:

> "General principles for grant of leave to amend (rr 5, 7 and 8) – It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made **"for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defects or errors in any proceedings."** (see *per Jenkins L. J. in R. L. Baker Ltd v Medway Building & Supplies Ltd* [1958] 1 W.L.R. 1216; [1958] 3 All E.R. 540, p.546)."

> "It is well established principle that the object of the amendment after the closing of the pleading Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake which, if not **fraudulent or intended to overreach,** the Court ought not to correct, **if it can be done without injustice to the other party.** Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace... **it seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a**

> **matter of rights on his part to have it corrected** if it can be done without injustice, as anything else in the case is a matter of right"(*per* Bowen L.J. in *Cropper v. Smith* (1883) 26 Ch. D. 700, pp. 710 – 711, with which observations A.L. Smith L.J., expressed "emphatic agreement" in *Shoe Machinery Co. v. Cultam* (1896) 1 Ch. 108. P. 112)."(emphasis added)

[41] Whether the intention of the party making the application to amend is 'fraudulent or intended to overreach' has to be determine from the conduct of the said party. If the affidavit in support of the amendment contains only a selective few communications whereas more direct and relevant communications were ignored or suppressed, the intention of the said party can be inferred as mala fide. Though the delay alone is not a sufficient ground for refusal, it can be a factor that reinforce mala fide if the affidavit in support ignored or suppressed material facts. The lack of clear reason for delay is another factor that reinforce bad faith. In the exercise of discretion the court can infer bad faith in seeking amendment, considering the conduct of the party making the application for amendment.

[42] Under Order 20/ 8/6 of the Supreme Court Practice of 1999 under the heading '**General principles for grant of leave to amend**' at page 379 further stated as follows:

> "In ***Tildesley v. Harper*** (1876) 10 Ch. D. 393, pp 396, 397, Bramwell L.J. said:
>
> "My practice has always been to give leave to amend unless I have been satisfied that the party applying **was acting mala fide**, or that, by this blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise." "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs" (*per* Brett M.R. *Clarapede v. Commercial Union Association* (1883) 32 WR 262, p263; *Weldon v. Neal* (1887)19 QBD 394 p.396. *Australian Steam Navigation Co. v. Smith* (1889) 14 App. Cas. 318 p 320; *Hunt*

v. Rice & Sons (1937) 53 TLR 931, C.A and see the remarks of Lindley L.J. *Indigo Co. v. Ogilvy* (1891) 2 Ch. 39; and of Pollock B. *Steward v. North Metropolitan Tramways Co.*(1886) 16 QBD.178, p.180, and *per* Esher M.R. p.558, C.A.). **An amendment ought to be allowed if thereby "the real substantial question can be raised between the parties,"** and multiplicity of legal proceedings avoided (*Kurtz v. Spence* (1888) 36 Ch, D. 774; The Alert (1895) 72 L.T. 124).

On the other hand it should be remembered that there is a clear difference between allowing amendments to clarify the issues in dispute and those that provide a distinct defence or claim to be raised for the first time (see, per Lord Griffiths in Kettma v Hansel Properties Ltd [11987] A.C 189 at 220).

Leave to amend will be given to enable the defendant to raise a defence arising from a change in the law since the commencement of the proceedings affecting the rights of the parties or the relief or remedy claimed by the plaintiff, even though this might lead to additional delay and expense and much longer trial, e.g. that the plaintiffs have acted in contravention of Art. 85 (alleging undue restriction of competition) and Article 86 (alleging abuse of dominant market position) of the treaty establishing the European Economic Community (the "Treaty of Rome") which became part of the law of the United Kingdom by the European Community Act 1972, so as to become disentitled to their claim for an injunction (Application des Gaz SA v Falks Veritas Ltd [1974] Ch. 381; [1974]3 All E.R. 51 CA)...

Where a proposed amendment is found upon **material obtained on discovery from the defendant and the plaintiff also intends to use if for some purpose ulterior to the pursuit of the action** (e.g. to provide such information to third parties so that they could bring an action), **the plaintiff should not be allowed to amend a statement of claim** endorse on the writ and so it the public domain but instead the amendment should be made as a statement of claim separate from the writ and thus not available for public inspection (Mialano Assicuranziona SpA v Walbrook Insurance Co Ltd [1994] 1 W.L.R 977 see too Omar v Omar [1995] 1 W.L.R. 1428, use of documents disclosed in relation to Mareva relief permitted to amend claim and at trial.

The Court is entitled to have regard to the merits of the case in an application to amend if the merits are readily

apparent and are so apparent without prolonged investigation into the merits of the case (King's Quality Ltd v A.J. Paints Ltd [1997]3 All E.R. 267)."

[43] In the year 2000 when the destruction of property occurred, no premium was paid, though the insurance company had given the insuaree (the Defendant-Respondent) an ultimatum to pay the premium by 29th March, 2000 but there was no payment by this date. So, when the said ultimatum expired, the Defendant-Respondent took the risk of not insuring the property mortgaged. There was no evidence that Defendant – Respondent, assumed that this payment would be settled by the Plaintiff-Appellant. In contrary, the Defendant – Respondent after the expiry of the deadline for cancellation of the insurance policy, given by the insurance company in March, had waited nearly 3 months to make a 'humble request' to the Plaintiff to pay the premium in June, 2000.

[44] The Defendant had requested from the Plaintiff to pay insurance premium alleging financial difficulty, in June, 2000, but this request was promptly declined by the Plaintiff - Appellant. These are deducible from materials disclosed by the Plaintiff – Appellant. The Defendant – Respondent had not produced any documents at the trial, but relied on documents produced by the Plaintiff – Appellant. The facts on this issue are readily available to the court without any prolonged investigation in to the merits. The proposed counterclaim based on the estoppel cannot be supported by the conduct of the Defendant – Respondent. The evidence that he is relying on is an attempt by the Plaintiff – Appellant to pay the insurance premium for the year 2000, but this cannot create any legally binding obligation to the Plaintiff – Appellant to pay the insurance premium for year 2000, when the direct communications between the Plaintiff – Appellant and Defendant – Respondent and the clause 3 of the mortgage contract are clear as to who should pay the insurance premium for year 2000.

[45] The letter dated 21st June, 2000 is contained in the Plaintiff's bundle of documents and this document indicate that Defendant – Respondent had requested the payment of insurance premium from the Plaintiff in year 2000 indicating that there was no misconception or expectation on the part of the Defendant, that who should pay the

insurance premium for the year 2000, though 1999 premium was paid by the Plaintiff. This position was reinforced by clause 3 of the mortgage contract where the obligation of payment was always with the Defendant irrespective of previous payments coupled with some attempts to pay even the premium for year 2000, which were annexed to the affidavit in support. The Plaintiff – Appellant for its own sake had paid premiums in year 1998 as well as 1999 but this payment in years 1998, and 1999 cannot create a legal obligation on the Plaintiff-Appellant to pay the insurance premium for year 2000.

[46] In years 1998 and 1999 the premiums for the respective years were made before the respective insurance policies were allegedly cancelled or an ultimatum was given to the Defendant to settle the payments or face a cancellation of the policy. So, the insurance payments were paid while the policy was alive. It is self evident that insurance policy was obtained primarily for the purpose of safeguarding the interest of the mortgagee as it was a condition in the mortgage contract between the parties. So, when the payment of insurance premium was not complied with, the Plaintiff-Appellant had paid it and safeguarded its interest in the property, while the Defendant – Respondent was paying the mortgage rentals, but even the said mortgage rentals were defaulted the bank had refused to pay the insurance premiums on behalf of the Defendant Respondent. There are more than one correspondence to indicate that these facts were within the knowledge of the Defendant – Respondents and had even written a letter to the Plaintiff-Appellant, soon after the destruction of the mortgaged property due to fire and it was again promptly replied denying any obligation on the part of the Plaintiff – Appellant to pay such premium for year 2000.

[47] There cannot be any promise on the part of Plaintiff – Appellant for the payment of insurance payment, which was fairly and squarely an obligation on the part of the mortgagor in terms of the mortgage contract. The statement in the affidavit in support that Defendant - Respondent was unaware of the obligation to pay the insurance premium cannot be accepted. This counter claim based on estoppel is doomed to fail and such amendment should be refused in the exercise of the discretion.

Conclusion

[48] Affidavit in support of the amendment (contained in Tab 7 of the record) had selective annexed 4 communications between the insurance company and the Plaintiff in support of the Defendant's contention, even these communications do not establish a counter claim based on estoppels. But taking other direct communications, between the Plaintiff – Appellant and Defendant – Respondent, which are more relevant to the issue of estoppel, as I have dealt in this judgment, it is evident that there was no room for counter claim based on estoppel as the Defendant - Respondent was fully aware of his obligation contained in clause 3 of the mortgage contract. Any attempt to pay the premium by the Plaintiff, was independent of the Defendant's obligation to settle the premium for year 2000 as the ultimatum was given as far back in March, 2000 to the Defendant – Respondent by the insurance company. The 'humble request' to pay the premium was in June, 2000, which was promptly declined by the Plaintiff – Appellant, before the destruction of the property. There is no arguable case for estoppel in favour of Defendant – Respondent, and the proposed amendment to introduce counterclaim based on estoppel is made in mala fide. So, the appeal should be allowed, hence the summons for amendment should be struck off.

Kotigalage JA

I agree with the findings of Lecamwasam JA.

Orders of the Court

1. Appeal is allowed.
2. The orders of the High Court Judge of 6 May 2011 are set aside as far as the order relates to paragraphs 8,9,10,11,12,13 and 15.
3. The defendant respondent is to pay a sum of $2000 to the plaintiff appellant.

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice C. Kotigalage
JUSTICE OF APPEAL

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Hon. Justice G. Amaratunga
JUSTICE OF APPEAL