

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 350 of 2010

BETWEEN: KARAM CHAND of Kasavu, Nausori, Fiji, Electrician.

PLAINTIFF

A N D: CHANDAR BHAN of Lot 7, Kings Road, Nasinu, Fiji,
Businessman.

1st DEFENDANT

A N D: BHAN AUTOPARTS LIMITED a duly incorporated company
having its principal place of business at Lot 7, Kings Road,
Nasinu, Fiji.

2nd DEFENDANT

Counsel : Mr. D. Singh for the Plaintiff
 Mr. R. Naidu for 1st & 2nd Defendants

Date of Hearing : 21st October, 2014
Date of Ruling: 15th April 2015

RULING

A. INTRODUCTION

1. The Plaintiff filed this Summons pursuant to Order 20 rule 5 of the High Court Rules seeking an order that leave be granted to the Plaintiff to amend the writ of Summons and statement of claim.

2. The Plaintiff filed an affidavit in support of this Summons, where he stated that he had to retain Mr. Daniel Singh as his new solicitor as his previous solicitor has been suspended. He was then advised by his new solicitor that amendments are required to the statement of claim for the determination of real issues in controversy between the parties. He further deposed that there is no evidence of prejudice to the Defendants if the amendments are granted. The Plaintiff annexed a draft amended statement of claim and writ of summons to his affidavit in support.

3. Upon being served with this Summons, Mr. Chandra Bhan, the first Defendant filed an affidavit in opposition to this Summons. The Plaintiff opted not to reply to the affidavit of the Defendants. According to the affidavit filed by the Defendants, it appears that there are mainly objecting to the paragraphs 6 and 7 of the proposed amended statement of claim. Their objection is founded on the ground that the Plaintiff is trying to introduce a new cause of action through the paragraphs 6 and 7 of the proposed amended statement of claim.

4. Subsequent to the filing of the respective affidavits, the Summons was set down for hearing on 21st of October 2014. The learned counsel for the Plaintiff and the Defendants made their respective oral arguments and submissions during the course of the hearing. Both counsel then filed their respective written submissions at the conclusion of the hearing. Having carefully considered the summons, respective affidavits and submissions of the parties, I now proceed to pronounce my ruling as follows.

B. THE LAW AND ANALYSIS,

5. Order 20 rules 5 of the High Court rules has given the court a discretionary power to allow the Plaintiff or any other party to the proceedings to amend their pleadings at any stage of proceedings on such terms as to cost or otherwise as may be just and in such manner as it may direct.

6. Lord Keith of Kinkel in Kettman and others v Hansel Properties Ltd (1988) 1 All ER 38 has discussed the principles of amendment of pleading in an inclusive manner, where his lordship has observed that

“whether or not a proposed amendment should be allowed is a matter within the discretion of the judge dealing with the application, but the discretion is one that falls to be exercised in accordance with well-settled principles. In his interlocutory judgment of 10 December 1982, allowing the proposed amendment, Judge Hayman set out and quoted at some length from the classical authorities on this topic. The rule is that amendment should be allowed if necessary to enable the true issues in controversy between the parties to be resolved, and if allowance would not result in injustice to the other party not capable of being compensated by an award of costs. In Clarapade & Co v Commercial Union (1883) 32 WR 262 a 263 Brett MR said;

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

7. Having discussed the principles of amendment of pleadings, Lord Keith further elaborated the test of injury to the other side, where his lordship found that;

“the sort of injury which is here in contemplation is something which places the other party in a worse position from the point of view of presentation of his case that he would have been in if his opponent had pleaded the subject matter of the proposed amendment at proper time. If he would suffer no prejudice from the point of view, then an award of cost is sufficient to prevent him from suffering injury and the amendment should be allowed. It is not a relevant type of prejudice that allowance of the amendment will or may deprive him of a success which he would achieve if the amendment were not to be allowed”.

8. The legal principles of amendment of pleadings have discussed in Reddy Construction Company Ltd v Pacific Gas Company Ltd (1980) FJCA 9; (1980) 26 FLR 121(27 June 1980), where the Fiji Court of Appeal held that

“the primary rule is that leave may be granted at any time to amend on terms if it can be done without injustice to the other side. The general practice to be gleaned from reported cases is to allow an amendment so that the real issue may be tried, no matter that the initial steps may have failed to delineate matters. Litigation should not only be conclusive once commenced, but it should deal with the whole contest between the parties, even if it takes some time and some amendment for the crux of the matter to be distilled. The proviso, however that amendment will not be allowed which will work an injustice is also always looked at with care. So in many reported cases we see refusal to amend at a late stage particularly where a defence has been developed and it would be unfair to allow a ground to be changed”.

9. Justice Pathik while determining an application made under order 20 r 7 for amendment of other documents, which is also founded on the same legal principles as of this application held in Fiji Electrical Authority v Suva City Council (1994) FJHC2; Hbc0901d.84s (5 August 1994) that

“the guiding principle of cardinal importance, namely, that all such amendment ought to be made for the purpose of determining the real question in controversy

between the parties to any proceedings or of correcting any defect or error in any proceedings”.

10. It appears from the above discussed judicial precedents, that the judicial approach in exercising its discretionary power on the issue of amendment of pleadings is founded on a wider liberal consideration of facilitating the parties to bring the real issues in controversy. As Lord Keith held in Ketteman and others v Hansel Properties Ltd(supra) the test of injustice to the other party is that to consider whether they are in a worse position in respect of presenting their case than they would have been in if their opponent had pleaded the proposed amendment at the proper time.
11. Turing in to this instant case, it is the onus of the Plaintiff to satisfy the court that the propose amendments are essentially important for the determination of the real dispute between the parties. However, the Plaintiff in his affidavit in support merely stated that the amendments to the writ of summons and statement of claim are necessary to determination of the real controversy between the parties. He has not explained or given any reason why and how these proposed amendments are essentially important to the determination of the real dispute between the parties.
12. The Plaintiff merely tendered a proposed amended statement of claim with a vertical red ink line on every pages of it. The affidavit has not introduced the amendments and how and why they are important for the determination of real issues in this action. Having considered the proposed amended statement of claim, it appears that the Plaintiff has tried to provide more details of the alleged negligence and the damages sustained by the Plaintiff. However, having considered the absence of any submissions or information how and why these amendments are essential to constitute the real controversy

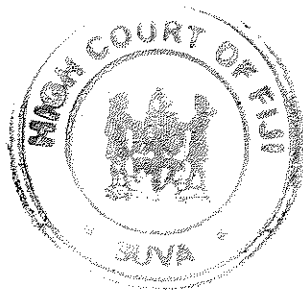
between the parties, it is my opinion that the Plaintiff has not satisfied the court that the proposed amendments to the statement of claim are essentially important to determine the real issue between the parties.

13. Having considered the reason set out above, I make following orders that;

i. The Summons for leave to amend writ of summons and statement of claim filed by the Plaintiff on 4th of July 2014 is hereby refused and dismissed,

ii. The cost to be the cost of the cause,

Dated at Suva this 15th day of April, 2015.



.....
R.D.R. Thushara Rajasinghe
Master of High Court, Suva