

IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION

Civil Action No. HBC 184 of 2014

BETWEEN : RUTH FONG of 10 Vatoa Street, Samabula, Suva, Credit Support Officer.

PLAINTIFF

AND : SUVA PRIVATE HOSPITAL LIMITED a limited liability company  
duly incorporated in Fiji and having its registered office at 120 Amy Street, Suva, Fiji.

FIRST DEFENDANT

AND : PUSHPA NUSAIR of Fiji National University, Derrick Campus, Suva.

SECOND DEFENDANT

AND : SIRELI KALOCAVA Ministry of Health, Colonial War Memorial Hospital,  
Suva.

THIRD DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSEL: Ms. Chetty - for the Plaintiff  
Mr. Tuitoga - for the First Defendant  
Mr. Fung - for the Second Defendant  
Ms. Tinaikoro - for the Third Defendant

Date of Hearing: 16<sup>th</sup> September, 2015

Date of Ruling: 08<sup>th</sup> December, 2015

RULING

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Application for leave to amend the defence by third Defendant - Pursuant to Order 20 (5) of the High Court Rules, 1988.

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## INTRODUCTION

1. The Third Defendant by Summons seek the leave of this court to file an amended defence.
2. The Summons is supported by an affidavit sworn on behalf of the Third Defendant by Seini Tinaikoro.
3. The application is made pursuant to Order 20 Rule 5 of the High Court Rules, 1988.
4. The Plaintiff opposes this application.

## THE LAW

5. *Order 20 Rule 5 of the High Court Rules, 1988* provides:

*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.*

## THIRD DEFENDANT'S SUBMISSIONS

*Counsel representing submitted:*

6. (a) The third Defendant's counsel, Cromptons are instructed by the Third Defendant's professional indemnity insurers (who are also the insurers for the Second Defendant) who are based in New Zealand. There was some difficulty in obtaining comprehensive instructions to enable Cromptons to file a detailed defence. The Defence filed on 27<sup>th</sup> August 2014 was therefore a holding defence pending receipt of more detailed instructions, as explained in Seini Tinaikoro's affidavit sworn on 10 March 2015. The Defence denied the allegations of negligence pleaded in the Plaintiff's statement of claim and, to that extent, was an adequate defence. It is noted that the defence of the Second Defendant also only contains bare denials of the allegations of negligence but the Plaintiff has not raised any objections to that defence.

- (b) The Third Defendant's application to amend his Defence has been made early in the proceedings, before the issue of a summons for directions, so this is not a case of a "last minute" application shortly before the trial.
- (c) It is acknowledged that the Third Defendant's application to amend his Defence has been made early in the proceedings, before the issue of a summons for directions, so this is not a case of a "last minute" application shortly before the trial.
- (d) It is acknowledged that the Third Defendant's application to amend his Defence was made after the Plaintiff's application for summary judgment was filed. However, the filing of the application for summary judgment was filed. However, the filing of the application for summary judgment did not prompt the Third Defendant's application for leave to amend his Defence. The application for leave to amend was made when detailed instructions on the statement of claim were received.
- (e) The success of the Plaintiff's application for summary judgment, if it proceeds, is moot as the Third Defendant's Defence filed on 27<sup>th</sup> August 2014 adequately denies the allegations of the Plaintiff in her statement of claim.
- (f) There is no suggestion that the application by the Third Defendant to amend his Defence is being made in bad faith.
- (g) It is considered that if the Third Defendant is allowed to amend his Defence, this will assist the Plaintiff as the Third Defendant's case will then be clearer to the Plaintiff in pursuing her claim.
- (h) It is difficult to understand what prejudice the Plaintiff will suffer if the Third Defendant is allowed to amend his Defence. The Plaintiff complains of delay, but it is the Plaintiff's opposition to the application for leave for the Third Defendant to file an amended Defence which is the main cause for delay. Had the Plaintiff consented to the application for leave to amend, the Plaintiff could have immediately proceeded with her case and filed a summons for directions, which is the next step in the proceedings, which, if she was intent on prosecuting her case with expedition, she could have filed as early as September 2014.
- (i) For the above reasons, it is submitted that the Third Defendant's application for leave to amend his Defence should be granted.

## **PLAINTIFF'S SUBMISSIONS**

*Counsel representing submitted:*

- 7 (a) The Plaintiff submitted that the Third Defendant only filed an application for leave to amend their Statement of Defence after the Plaintiff's application for summary judgment was filed.

- (b) To begin with the Third Defendant filed their Statement of Defence out of time and only filed their Statement of Defence they were put on notice that the Plaintiff will proceed to enter interlocutory judgment should a Statement of Defence not be filed.
- (c) The Plaintiff submits that the Third Defendant has now sought leave to amend their statement of Defence in order to cure shortfalls and now attempts to insert in their Statement of Defence a valid or substantial defence in law following the Plaintiff's application of summary judgment.
- (d) The Plaintiff submits that the Third Defendant's Statement of Defence, falls to answer the Plaintiff's claim whereby the Third Defendant's Statement of Defence has no valid or substantial defence in law.
- (e) The Plaintiff humbly submits that Order 20 Rule 5 of the High Court Rules allow a party to amend their pleadings at any time with leave of the Court if pleadings have closed. Nevertheless, the Plaintiff directs this Honourable Court to para 20/08/2010 of the Whitebook, 1999 ed., Volume 1 states that:

*"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 misrepresentations or other such serious allegation, the Court will ask why this new case was not presented originally; and may require to be satisfied as to the truth and substantially of the proposed amendments".*

- (f) Hence, the Plaintiff considers the Third Defendant's position as deposed in the affidavit of Seini Tinaikoro at paragraph 4 and 5 respectively that when the initial Statement of Defence was filed, there was no detailed information or instructions and it is now after full instructions have been received that the Third Defendant makes an application for leave to amend their Statement of Defence.
- (g) The Plaintiff submits that the Third Defendant had ample time from the time they were served with the Plaintiff's Writ action to obtain relevant instructions and information and file an amended Statement of Defence. The Third Defendant had ample time to file an amended Statement of Defence from the time they had filed their Statement of Defence on 27<sup>th</sup> August 2014 until the time before the Plaintiff filed an application for Summary Judgment on 4<sup>th</sup> February 2015.
- (h) The Plaintiff directs the Honourable Court to para 20/8/33 of the Whitebook, 1999 ed., Volume 1 states that:

*"Amendments which could prejudice the rights of the opposite party existing at the date of the proposed amendment are not, as a rule, admissible".*

It further states at para 20/8/33 that *"...amendments which might affect the position of other persons, e.g. plaintiffs, in similar actions may be refused".*

- (i) The Plaintiff submits that if leave is granted to the Third Defendant to amend the Statement of Defence, this will heavily prejudices the plaintiff and nullifies the Plaintiff's

application for Summary Judgment made pursuant to Order 14 Rule 1 and Order 14 Rule 8. Hence, the Plaintiff submits that leave should not be granted to the Third Defendant to amend their Statement of defence.

- (j) The Plaintiff submits that the prejudice is the delay and lapse of time since the Writ action was filed in July 2014 and it has now been one year and allowing the Third Defendant to amend their Statement of Defence will result in the Plaintiff being subjected to further delay and costs.
- (k) The Plaintiff submits that the application of the Third Defendant for leave to amend their Statement of Defence be refused on the basis that if leave is granted to allow an amendment then this will result in prejudice to the Plaintiff.

### ANALYSIS and DETERMINATION

8. The Plaintiff commenced the substantive proceedings by a Writ of Summons on 04<sup>th</sup> July, 2014 claiming as follows-
  - (a) A Declaration that the First Defendant is vicariously liable for the acts and omissions of the Second and Third Defendant.
  - (b) General damages for pain and suffering and loss of amenities and enjoyment of life.
  - (c) Special damages.
  - (d) Future economic loss, including loss of earning capacity.
  - (e) Costs of future care and treatment.
  - (f) Interest on the awards at such rate and for such period as this Honorable Court deems fit.
  - (g) Post judgment interest under the Imperial Judgments Act 1838 and pursuant to Order 6 Rule 2 (12) of the Whitebook, Volume 1, 1997 Ed, at the rate of 8% from the date of judgment until payment.
9. Subsequently, the Plaintiff filed and served an amended Writ of Summons on 10<sup>th</sup> July, 2014.
10. The Third Defendant filed the acknowledgment of service on 28<sup>th</sup> July, 2014 and Defence on 27<sup>th</sup> August, 2014 respectively.
11. The Plaintiff in its written submissions stated that subsequent to the Third Defendant filing its Defence, the Plaintiff then filed a Reply. Upon the perusal of the court record, I was unable to find evidence of any Reply to the Third Defendant's Defence being filed. Now, if there was no reply filed and served

to Third Defendant's Defence by the Plaintiff, then the pleadings is not deemed closed at this stage of the proceedings. Reference is made to *Order 20 Rule 3 of the High Court Rules, 1988* which provides:

*Amendment of pleadings without leave (O.20, r.3)*

3.-(1) *A party may, without the leave of the Court, amend any pleading of his once at any time before the pleadings are deemed to be closed and, where he does so, he must serve the amended pleading on the opposite party.*

Even, presumably, if the Plaintiff had filed and served a Reply to Third Defendant's Defence, still in terms of *Order 20 Rule 5(1) of the High Court Rules, 1988*, the court is empowered to allow Amendment of writ or pleadings with leave of the court (O.20, r.5). Further, this court has taken note that the Plaintiff has filed a 'SUMMONS' to enter summary judgment against the Third Defendant prior to the Third Defendant filing the present application for leave to file an amended Defence.

12. The Plaintiff submitted in their written submissions that "*the third defendants statement of defence, fails to answer the Plaintiff's claim whereby the third defendant's statement of defence has no valid or substantial defence in law.*"

On the other hand, the Third Defendants Counsel submitted "*that if the amendment is allowed by the court, this will assist the Plaintiff as the Third Defendant's case will then be clearer to the Plaintiff in pursuing her claim.*"

13. The Third Defendant in the affidavit deposed by Seini Tinaikoro at paragraphs 4 and 5 explains that "*the Defence was filed without full detailed instructions and information from the Third Defendant and Cromptons has now received fuller and more detailed information from the Third Defendant and is therefore in a position to apply for leave to file an amended Defence which is annexed and marked 'ST1'.*"

Accordingly, the Third Defendant filed an application seeking leave to file an amended Defence:

14. In *Cropper v Smith* (1884) 26 Ch. D. 700 at p 710 Bowen L.J. said

*"Now, I think it is a well-established principle that the object of Courts 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. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, 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 of grace."*

And his Lordship added at p 711:

*"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 right 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."*

15. A.L. Smith L.J in *Shoe Machinery Co. v Cutlan* [1896] 1 Ch. 108 at p 112 expressed himself to be in emphatic agreement with Bowen L.J.'s observations.

16. Order 20 rule 5 (1) of the High Court Rules provides:

*"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." (Underline mine)*

Amendment may be allowed "at any stage of the proceedings" which includes during a trial. *The Duke of Buccleuch* [1892] P. 201, at p 211 per Lord Esher MR; *G.L. Baker Ltd. v Medway Building & Supplies Ltd.* [1958] 1 WLR 1216. With some reluctance the trial judge was prepared to allow the statement of claim to be amended in *Loutfi v C. Czarnikow Ltd.* (1952) 2 All ER 823 as late as after the close of the case but before judgment.

In *Loutfi* (supra) at p 824A Sellers J outlined the reasons for the amendment and said:

*"I think it would be only in conformity with well-established rules that I should allow that amendment because it is simply setting out in the pleadings that which has emerged in the course of the case as an issue between the parties."*

Earlier at p 823F his Lordship had indicated the requisite test and said:

*"I entirely accept the submission for the Defendants that that is very late, and that the court should be reluctant to grant amendments at such a late stage unless there is very good ground and strong justification for so doing."*

17. In *Kettleman and others v Hansel Properties Ltd* (1988) 1 All E R 38 where it was observed-

*'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'.*

18. In *Reddy Construction Company Ltd v Pacific Gas Company Ltd* (1980) FJCA 9; (1980) 26 FLR 121 (27 June 1980), where it was held-

*'The primary rule is that leave may be granted at any time to attend 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'.*

19. *Peter Sujendra Sundar and anor v Chandrika Prasad* Civil Appeal No. ABU 0022/97, the court of appeal at page 9 appropriately summarised the reasoning and the test for the permission to grant or refuse an amendment as follows-

*'...generally, it is in the best interest of the administration of justice that the pleadings in an action should state fully and accurately the factual basis of each party's case. For that reason amendment of*



*pleadings which will that effect are usually allowed, unless the other party will be seriously prejudiced thereby (G.L. Baker Ltd. V. Medway Building and supplies Ltd [1985] 1 WLR 1231 (C.A). The test to be applied is whether the amendment is necessary in order to determine the real controversy between the parties and does not result in injustice to other parties; if the test is met, leave to amend may be given even at a very late stage of the trial (Elders Pastoral Ltd v. Marr (1987) 2 PRNZ 383 (C.A).'*

20. Whether there will be any issue of prejudice caused to the Plaintiff if the court accedes to the Third Defendant's application for leave to amend his Defence?

According to the Plaintiff, whilst directing court to para 20/8/33 of the Whitebook, 1999 ed., Volume 1 states that:

*"Amendments which could prejudice the rights of the opposite party existing at the date of the proposed amendment are not, as a rule, admissible."*

It further stated: *"..amendments which might affect the position of other persons, e.g. Plaintiffs, in similar actions may be refused."*

The Plaintiff submitted that if leave is granted to the Third Defendant to amend the Statement of Defence, this will heavily prejudice the Plaintiff and nullify the Plaintiff's application for Summary Judgment made pursuant to Order 14 Rule 1 and 8 respectively. Further, the prejudice is the delay and lapse of time since the Writ action was filed in July, 2014 and it has been now one year and allowing Third Defendant leave to amend their Statement of Defence will result in the Plaintiff being subjected to further delay and costs.

On the other hand, the Third Defendant submitted *"there is no suggestion by the Plaintiff that the application by the Third Defendant for leave to amend his Defence in being made in bad faith."* If I may add, there is also no suggestion that leave to amend the Defence by the Third Defendant is an afterthought and only made when Summary Judgment application was filed and served onto them.

The Third Defendant further submitted *"that it is considered that if the Third Defendant is allowed to amend his defence, this will assist the Plaintiff as the Third Defendant's case will then be clearer to the Plaintiff in pursuing her claim. Adding that it is difficult to understand what prejudice the Plaintiff will suffer if the Third Defendant is allowed to amend his Defence. The Plaintiff is complaining of delay, but it is the Plaintiff's opposition to the application for leave for the Third Defendant to file an amended Defence which is the main cause for delay. Had the Plaintiff consented to*

*the application for leave to amend, the Plaintiff could have immediately proceeded with her case and filed a summons for directions, which is the next step in the proceedings, which, if she was intent on prosecuting her case with expedition, she could have filed as early as September, 2014."*

21. With regards to the Plaintiff's submissions that if leave is granted to the Third Defendant to amend the Statement of Defence, this will heavily prejudice the Plaintiff and nullify the Plaintiff's application for Summary Judgment, and that prejudice is the delay (underline is mine).

I deem to differ from the Plaintiff's submissions for the following reasons-

- *When Summary Judgment application is filed and served in terms of Order 14 of the High Court Rules, Rule 1 (1) provides-*

*1.-(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant. AND Rule 3(1) provides-*

- *3.-(1) Unless on the hearing of an application under rule 1, either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.*
- *Even if the leave is granted to the Third Defendant to amend his Defence, it is still premature at this stage of the proceedings for court to determine whether the amended Defence to be filed will show that the Defendant has no Defence or the Defendant will fail to satisfy to this court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim.*
- *Therefore, the pending Order 14 application will not be impacted upon at this stage of the proceedings or in any way will nullify the Plaintiff's application, if the court allows Third Defendant leave to file his amended Defence.*
- *The Plaintiff will still be at liberty to proceed with her Order 14 application for summary judgment in terms of the Law.*

22. I find there will be no prejudice caused to the Plaintiff in any way whatsoever, if this Court accedes and allows the Third Defendants application granting leave to file amended Defence.

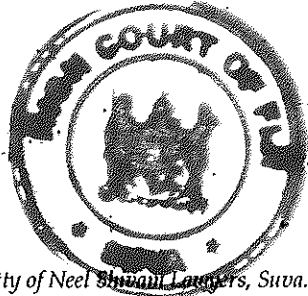
23. For the aforesaid rational I make the following final orders, accordingly.

### Final Orders

1. The Third Defendants application succeeds.

2. The Third Defendant to file and serve the amended Defence within 14 days.
3. The Plaintiff to file and serve any Reply to Third Defendants amended Defence 14 days thereafter.
4. This case will now be adjourned to 09<sup>th</sup> February, 2016 for further directions.

DATED at Suva on 08<sup>th</sup> December, 2015



A handwritten signature in black ink, appearing to read "VISHWA DATT SHARMA".

.....  
VISHWA DATT SHARMA  
Master of the High Court, Suva

Cc. Ms. Chetty of Neel Shivanji Lawyers, Suva.  
Ms. Tinaikoro of Cromptons, Suva..