IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 153 of 2014

BETWEEN : **RAJESH PATEL** of Lautoka City, Lautoka,

PLAINTIFF

AND : **VUVALE RESORT LIMITED**, a limited liability company having its registered office at Suva.

DEFENDANT

Mr. Eroni Maopa for the Plaintiff
Mr. Krishneel Krishan Naidu for the Defendant

Date of Hearing : - 25th July 2016
Date of Ruling : - 25th November 2016

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Summons filed by the Plaintiff pursuant to Order 20, rule 5, Order 15, rule 1 (1) & (2), Order 15, rule 4, Order 29, rule 9 & 10 of the High Court Rules, 1988 and the inherent jurisdiction of the Court, seeking the grant of the following Orders;

Para 1. *Leave be granted to the Plaintiff to amend the Writ of Summons and Statement of Claim issued out by the High Court Registry, Lautoka on 06th day of May 2015.*

2. *Leave be granted to the Plaintiff to join Yue Lai Hotel Company Limited a duly incorporated limited liability company having its registered office at 1st floor, Harifam Centre, Greg Street, Suva be joined and a party to the proceedings as Second Defendant.*

3. *Leave be granted to the Plaintiff to amend the orders sought in the Notice of Motion filed on 8th June 2015 to read;*

   1. *That the second defendant is restrained from selling, assigning, transferring, developing or dealing whatsoever with the property at Malaqereqere, Sigatoka being certificate of title No. 23808 Lot 3 DP 5734 having an area of 4.8130 hectares until further order of the court.*

   2. *Alternatively, for an interim order restraining the second defendant from selling, assigning, developing or dealing whatsoever with the property at Malaqereqere, Sigatoka being certificate of title No. 2308 Lot 3 DP 5734 having an area of 4.8130 hectares pending the determination on the hearing of the final injunctive orders.*

   3. *That the first defendant pay into Court the sum equivalent to the market value of the piece of land marked in green as per agreement dated 14th November 2005 being Lot 1 comprising of 1,2132 hectares of land in certificate of title 573 no. 23808 Lot 3 DP 5734.*

   4. *That costs be in the cause.*

(2) The Summons is supported by an Affidavit sworn by the Plaintiff on 23rd March 2016.

(3) The Summons is vigorously contested by the Defendant. Regrettably, the Defendant did not file an Affidavit in Opposition and relied upon the oral submissions and written submissions filed on 25th July 2016.

(B) THE FACTUAL BACKGROUND

(1) What is this case about?

What are the circumstances that give rise to the present application?

(2) By an agreement dated 14th November 2005, the Plaintiff sold a property in Cuvu, Sigatoka to **Vuvale** (the Defendant).The Property was approximately 4.8 hectares in area and was the subject of Certificate of Title No. 23808 and described as Lot 3 on deposited plan no. 5734.

Vuvale (the Defendant) was to sub-divide the Property and transfer a lot of approximately 1.2132 hectares in area **("Lot-1")** to the Plaintiff within 6 months from settlement i.e. by 16th August 2006 (since settlement occurred on 16th February 2006). (See, Clause 2 of the Sale and Purchase Agreement- annexure and marked **RP-1** referred to in the affidavit of Rajesh Patel sworn on 29th June 2015.) For various reasons, this did not take place. It is now more than 9 years since Vuvale was to transfer Lot 1.

The Plaintiff himself too took no steps towards the performance of the transfer of Lot-1 whether in Court or otherwise until he issued the Writ on 06th May 2015. At that time, **Vuvale** had decided to sell the Property to **Yue Lai** (the purported Defendant). Vuvale advised the Plaintiff that it was selling the Property to Yue Lai and that Yue Lai had agreed to carry out the sub-division and transfer Lot -1 to the Plaintiff.

The Plaintiff immediately lodged a **caveat** against the transfer of the whole Property. The Registrar of Titles, at Vuvale's request, issued a Notice to the Plaintiff to remove the caveat, and the Plaintiff then filed an ex parte Originating Summons on 11th September 2014 ("Originating Summons") seeking, amongst other things, an extension of his caveat and an order that Vuvale specifically perform its obligation to transfer Lot- 1 to him.

On 15th September 2014 after hearing the Originating Summons ex parte, the Court Ordered;

- an extension of the Plaintiff's caveat,
- the Plaintiff to serve the documents on Vuvale, and
- the remainder of the Originating Summons be heard inter partes.

On 29th January 2015, Vuvale, filed Summons to set aside the order extending the Plaintiff's caveat on the basis that the extension had been obtained improperly by way of an ex parte application when it is established law that such issues must be decided inter partes.

The Plaintiff ultimately conceded that the extension had been improperly obtained and by consent the Court ordered on 18th February 2015 that the order extending the caveat is dissolved. Later, on 31stMarch 2015, the Court made a further order clarifying that the caveat had lapsed as a result.

On 22ndApril 2015, the Court granted the Plaintiff's application to convert his Originating Summons, and ordered the Plaintiff to file a Statement of Claim and the Defendants to file their Statement of Defence thereafter. The Plaintiff filed a Writ endorsed with a Statement of Claim on 6th May 2015 – Vuvale and the Registrar of Titles remained as defendants.

Vuvale filed its Acknowledgement of Service on 23rd June 2015 and Statement of Defence on 24th June 2015. The Plaintiff did not file a Reply and the pleadings were closed on 8th July 2015.

In the meantime, on 8th June 2015, the Plaintiff filed a Notice of Motion seeking an injunction to restrain the Defendants from transferring the whole Property to Yue Lai. This is the Notice of Motion which the Plaintiff now seeks to amend.

However on 30th June 2015, the Plaintiff had filed an ex parte Motion seeking another injunction to restrain the Registrar of Titles from registering a transfer of the Property and to withdraw his Notice of Motion filed on 8th June 2015.

The Court heard the Ex Parte Motion on the same day (30th June 2015) and delivered a written ruling – the Court allowed the Plaintiff's application to withdraw the Notice of Motion filed on 8th June 2015 and struck it out. The Court refused the injunction sought in the Ex parte Motion filed on 30th June 2015. On 02nd July 2015, the Plaintiff discontinued his action against the Registrar of Titles (the Second Defendant).

(C) THE APPLICATION

On 23rd March 2016, the Plaintiff filed this Application to amend his Statement of Claim, by joining **Yue Lai** as the Second Defendant, adding fresh claims against **Vuvale** and **Yue Lai** and amending the Notice of Motion dated 8th June 2015 (which has already been withdrawn and struck out).

The Application is made pursuant to O. 20, r5, O.15 r.1 (1) & (2), O.15 r.4 and O.29 r.9 & 10 of the High Court Rules, 1988 ("Rules"), and the inherent jurisdiction of the Court.

Vuvale did not file an affidavit in opposition. It relied on the oral submissions presented to Court and the written submissions.

(D) THE LAW

(1) Against this factual background, it is necessary to turn to the applicable law and judicial thinking in relation to the principles governing the exercise of the discretion to make the Order the first Defendant now seeks.

(2) Rather than refer in detail to the various authorities, I propose to set out, with only important citations, what I take to be the principles in play.

(3) This is **primarily** the Plaintiff's application to amend his Writ and the Statement of Claim pursuant to **Order 20, rule 5 of the High Court Rules, 1988.** The law relating to grant of leave to amend pleadings is set out under **Order 20, rule 5 of the High Court Rules, 1988.**

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

> *"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."*

(4) **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 (rr5, 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)."*
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> (Emphasis added)

> *It is a well-established principle that the object of the court is to decide 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 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" (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)."*

(5) **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** (1878) 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 if 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 (1837) 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).*
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> *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 [1987] A.C. 189 at 220).*
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> *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 a 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 Communities Act 1972, so as to become disentitled to their claim for an injunction (Application des Gaz SA v Falks VeritasLtd [1974] Ch. 381; [1974]3 All E.R. 51 CA). In a copyright action, leave may be given to amend the statement of claim to include allegations of similar fact evidence*

of the defendant having copied the products of other persons (Perrin v Drennan[1991] F.S.R. 81).

Where a proposed amendment is founded 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*** *endorsed 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 Assicuraniona 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)."

(6) Hon.Madam Justice D.Wickramasinghe stated in **Colonial National Bank v Naicker [2011] FJHC 250; HBC 294. 2003 (6 May 2011)** by direct reference to the Supreme Court Practice 1988 (White Book) as set out under Order 20/5-8/6 as:

"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, p 1231; [1958] 3 All E.R 540, p. 546)."

Hon. Justice Pathik in **Rokobau v Marine Pacific Ltd *Hbc0503d.93s*** said:

"We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps

have power to allow such an amendment, but certainly as a general rule it will not do so."

(7) Lord Keith of Kinkel in **Ketteman and others v Hansel Properties Ltd** (1988) 1 All ER 38 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".*

(8) **LORD KEITH OF KINKEL in KETTEMAN v HANSEL PROPERTIES** *(supra)* states further that;

> *"The effect of these authorities can, I think, be summarised in the following four propositions. First, all such amendments should be made as a necessary to enable the real questions in controversy between the parties to be decided.*
> *Secondly, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate orders as to costs."*

Speight J. in **Reddy Construction Company Ltd v Pacific Gas Company Limited (1980) 26 FLR 121 held;**

> *"The primary rule is that leave may be granted at any time to amend on terms if it can be done without prejudice to the other side."*

(E) ANALYSIS

(1) The Plaintiff in his application to amend sought to introduce "Yue Lai" as a Defendant, make fresh claims against "Vuvale" **(Defendant)** and "Yue Lai" **(the purported Defendant)** and amend the Notice of Motion dated 08th June 2015 which has already been withdrawn and struck out.

(2) The proposed Draft Amended Writ of Summons and the Statement of Claim is annexure and marked RP-1 referred to in the Affidavit of the Plaintiff deposed on 23rd March 2016.

(3) I focus on paragraph (8), (9) and (10) of the proposed Amended Statement of Claim. As I understand it, the Plaintiff attempts to replace his claim for **specific performance** with a new claim in **negligence** against Vuvale (the Defendant).

The paragraph 8, 9 and 10 are in these terms;

Para 8. *That the 1st Defendant was negligent in allowing the agreement to lapse.*

Particulars of negligence

- *Fail to subdivides the said property being Certificate of Title No. 23808 DP 5734 situated at Malaqereqere, Sigatoka and marked as Lot 1*
- *Fail to transfer separate title of the said Lot 1.*
- *Failing to act and or comply with the mandatory period of 6 months to subdivide and transfer Lot 1 to the Plaintiff.*
- *Fail to preserve (Lot 1) of the portion of land that the Plaintiff is entitled.*
- *Fail to inform and invite the Plaintiff to participate in drafting and or party to the Sales and Purchase agreement entered between the 1st and 2nd Defendant.*

- *Fail to reserve the Plaintiff's share of the sale proceed.*

9. *That the 1st Defendant failed, neglected or refused to take any necessary action to comply with term under clause 2 of the Sale and Purchase Agreement until April or May 2014.*

10. *That the 1st Defendant had sold the said property to the 2nd Defendant without subdividing the Plaintiff's Lot 1 and without the knowledge of the Plaintiff.*

(4) I also focus on paragraph 13 – 20 of the proposed amended Statement of Claim. As I understand it, the Plaintiff attempts to plead that **"Yue Lai"** (the purported Defendant) and **Vuvale** (the Defendant) **colluded to defraud the Plaintiff.**

The paragraph 13 – 20 is in these terms;

Para 13. *The 2nd Defendant is a limited liability company having its registered office at 1st Floor, Harifam Centre, Suva.*

14. *That the Plaintiff has an interest in the Certificate of Title no. 23803 Lot 3 DP 5734.*

15. *That the 2nd Defendant entered into a Sales and Purchase agreement with the 1st Defendant to purchase Certificate of Title No. 23803 Lot 3 DP 5734, Malaqereqere, Sigatoka without the Plaintiff being a party (said property).*

16. *That the said property was registered unto the name of 2nd Defendant on 23 June 2015.*

17. *That the 2nd Defendant neglected and/or failed to inform the Plaintiff to participate in the drafting or be part of the agreement between the Defendants.*

18. *That the 2nd Defendant with the knowledge that the Plaintiff has interest in the land failed to preserve the Plaintiff's interest in the Sales and Purchase agreement.*

19. *That the 2nd Defendant with the knowledge that the Plaintiff has interest in the land failed to preserve the Plaintiff's share on the proceeds of sale.*

20. *That the 2st and 2nd Defendant colluded with each and to defraud the Plaintiff of his interest on the land.*

(5) (i) Mr.Naidu, in opposing the application relied on the written submissions filed herein.

In summary, the "principle" objections to the application as submitted by the Defendants are as follows;

- The amendments sought are **statute-barred** and have **no prospect of success.**
- The Plaintiff does not properly plead a claim in negligence.

(ii) I focus on paragraph 30, 31, 34, 37, 42, 43, 44 and 45 of the Defendant's written submissions. They are in these terms;

Para 30. *In the proposed paragraph 8, the Plaintiff attempts to replace his time-barred claim for specific performance with a new negligence claim against Vuvale.*

31. *Leaving aside the question of whether a vendor can ever owe a duty of in tort to be careful to a purchaser to perform a contract, the amendment is bad first of all as it does not properly plead a claim in negligence.*

34. *The proposed amendment does not meet those requirements. The proposed amendments do not plead any duty at all. Paragraph 8 refers to "allowing the agreement to lapse" but no facts are pleaded about any alleged lapsing of any agreement caused by Vuvale. No facts are pleaded to support the allegation that Vuvale did not preserve Lot 1 nor are there any facts to support the claim that the Plaintiff was entitled to a share of the sale proceeds. The Plaintiff only had a right to enforce the original contract or claim damages for breach which is time-barred. The Plaintiff has also not expressly pleaded that he suffered any loss or damage.*

37. *It is submitted that any claim for negligence relating to the transfer of the Lot is time barred and has no prospects of success. Allowing the amendment would be prejudicial to Vuvale. The Court is invited to refer to Justice Ajmeer's Ruling delivered on 30 June 2015 on the Plaintiff's ex parte Notice of Motion, where his Lordship states at paragraphs 6 and 7:*

> *"6. The plaintiff seeks specific performance of a sale and purchase agreement entered in November 2005 between the*

plaintiff and the first defendant. The action to seek specific performance was brought in September, 2014.

7. There has been delay of over 7 years in bringing the action. The plaintiff's action appears to be time-barred."

42. The proposed amendments are also hopeless when the relief sought is considered; Prayer (1) seeks that payment into court of the market value of Lot 1 as substantive relief. It is submitted that the Court has no power to make such an order as the final relief in any action.

43. Prayer 2 is also with respect hopeless. It seeks "an injunction against the 2nd Defendant" without specifying what the terms of the injunction would be.

44. Prayer 3 seeks damages for breach of contract when there is no breach of contract pleaded in the proposed Amended Statement of Claim. Conversely the Plaintiff does not seek any remedy relating to his proposed new causes of action.

45. It is therefore respectfully submitted that the proposed amendments all have no prospects of success and leave to amend should be refused.

(iii) Although, I directed the Plaintiff to file written submissions, he chose not to do so, which by any means is not a commendable practice at all.

(6) What concerns me is whether the Plaintiff should be allowed to amend the Writ of Summons and the Statement of Claim.

I remind myself the words of **Lord Keith of Kinkel** in **"Ketteman v Hansel properties Ltd"**, *Supra;*

"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 on 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 a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.

Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings."

I ask myself, what is the rule of conduct of this Court in an application such as this?

I again remind myself the words of **Lord Keith of Kinkel in "Ketteman v Hansel properties Ltd"**

"With regard to the principles on which the discretion to allow or refuse the applications to amend should be exercised, the judge referred to the notes to RSC Ord 20, r 5 in the Supreme Court Practice 1982 and to the authorities there cited. The effect of these authorities can, I think, be summarised in the following four propositions.

First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided.
Second, amendments should not be refused solely applying for leave to make them: it is not the function of the Court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights.

Third, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendments earlier, and however late the application for leave to make such amendments may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party.

Fourth, there is no injustice to the other party if he can be compensated by appropriate orders as to costs. The Plaintiff to continue with the matter and also directed":

(7) Let me now move to consider the Plaintiff's application bearing the following mentioned principles uppermost in my mind.

a. *the Court can grant leave to amend at any stage of the proceedings*

b. *amendments are only granted if they bear out the real issues in controversy between the parties*

c. *an amendment adding a new cause of action after the expiry of limitation period is only permitted if the writ was filed before the limitation expired*

d. *amendments are not permitted if –*

i. *they are fraudulent or made to overreach*

ii. *they will cause injustice or prejudice to the other party, which cannot be remedied by costs, or*

iii. *they have no prospect of success.*

e. *The basis of an amendment is to ensure that the real issue is tried and the court should deal with the whole matter in contest between the parties.*

f. *Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy.*

g. *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 (**Ketterman v Hansel Properties Ltd,** (Supra)*

h. *"An amendment should be allowed if it could be done without prejudice to the other side*

i. *I have to balance the extent of prejudice with the extent of the Plaintiffs need to make the amendments.*

j. *It is a matter of pure judgment or discretion which is not susceptible to the giving of any other reasons.*

(8) With that in mind, let me now turn to the application. The proposed amended Statement of Claim is annexed and marked RP-1 referred to in the supporting Affidavit of the Plaintiff sworn on 23rd March 2016.

The thrust of paragraph 8 to 10 of the proposed amended Statement of Claim is a substitution of a new cause of action against Vuvale (the Defendant) for a Claim in **Negligence** and abandonment of the original claim for **Specific Performance**. For the sake of completeness, the paragraph 8 – 10 of the proposed Amended Statement of Claim is reproduced below in full;

Para 8. *That the 1st Defendant was negligent in allowing the agreement to lapse.*

Particulars of negligence

- *Fail to subdivides the said property being Certificate of Title No. 23808 DP 5734 situated at Malaqereqere, Sigatoka and marked as Lot 1*

- *Fail to transfer separate title of the said Lot 1.*

- *Failing to act and or comply with the mandatory period of 6 months to subdivide and transfer Lot 1 to the Plaintiff.*

- *Fail to preserve (Lot 1) of the portion of land that the Plaintiff is entitled.*

- *Fail to inform and invite the Plaintiff to participate in drafting and or party to the Sales and Purchase agreement entered between the 1st and 2nd Defendant.*

- *Fail to reserve the Plaintiff's share of the sale proceed.*

9. *That the 1st Defendant failed, neglected or refused to take any necessary action to comply with term under clause 2 of the Sale and Purchase Agreement until April or May 2014.*

10. *That the 1st Defendant had sold the said property to the 2nd Defendant without subdividing the Plaintiff's Lot 1 and without the knowledge of the Plaintiff.*

In my view, the proposed amendment is inexcusably inaccurate as it does not raise properly a claim in negligence. The facts stated in the proposed amendment do not set out facts which show;

- ❖ That the Defendant owed him (Plaintiff) a duty of care;
- ❖ That the Defendant was in breach of that duty; and
- ❖ That he (Plaintiff) has suffered damage as a result of that breach.

I find considerable support for my view in Atkin's encyclopaedia of Court Forms in Civil Proceedings, second edition, volume 29. The page 08 states;

> *Pleading. It is not enough for the plaintiff in his Statement of Claim to allege merely that the defendant acted negligently and thereby caused him damage; he must also set out facts which show that the alleged negligence was a breach of a duty which the defendant owed to the plaintiff. The Statement of Claim "ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged" (per Willes J. in* ***Gautret v. Egerton*** *(1867) L.R. 2 C.P. 371, cited with approval by*

> *Lord Alverstone C.J. in* ***West Rand Central Mining Co. v R. [1905] 2 K.B. at 400).*** *Then should follow an allegation of the precise breach of that duty, of which the plaintiff complains; in other words, particulars must always be given in the pleading, showing in what respect the defendant was negligent; and lastly, the details of the damage sustained.*
>
> ***Where the duty is founded on contract, or arises out of a relation created by bailment or retainer, the facts must be set out which created the duty.*** *But where the duty is one which all citizens owe to each other, as e.g., not to run over a man in the street, the duty need not be specifically alleged. It is enough to state the facts with a general allegation that the defendant acted negligently. An express allegation of duty on the part of the defendant is a mere inference of law. If the facts stated do not raise the duty, the express allegation is unnecessary, and therefore ought not to be introduced (****Cane v Chapman*** *(1836) 5 A. & E. 647, referred to in* ***Seymour v Maddox (1851) 16 Q.B. 326;*** *and see per* ***Cotton L.J., Hurdman v. N. E. Ry. (1878) 3 C.P.D. at 173),*** *see supra, pp. 36, 157.*
>
> (Emphasis added)

Moreover, I am comforted by a passage in the learned authors of **Bullen & Leake's Precedents of Pleadings (11th Edition).** The page 533 states the following –

> *"It is not enough for the Plaintiff in his Statement of Claim to allege merely that the defendants acted negligently and thereby caused him damage; he must also set out facts which show that the alleged negligence was a breach of a duty which the defendant owed to the plaintiff. The Statement of Claim "ought to state facts upon which the supposed duty facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged" (per Willies J. in* ***Gautret v Egerton*** *(1867) L. R. 2 C. P. 371,* *cited with approval by Lord Alverstone C.J. in* ***West Rand Central Mining Co. v R.*** *[1905] 2 K.B. at 400). Then should follow an allegation of the precise breach of that duty, of which the plaintiff complains; in other words, particulars must always be given in the pleadings, showing in what respect the defendant was negligent; and lastly, the details of the damage sustained."*

Applying those principles to the case before me what do we find?

The proposed amendments (paragraphs 8 to 10) do not plead any duty of care at all. I cannot find out what duty of care and which created duty. What are the facts upon which the duty is founded? There is not a word of this in paragraphs 8 to 10. **Was any duty cast upon the Defendant?** There is not a word of allegation to show that the defendant was in breach of duty. **Then how does the liability arise?** One word more, the Plaintiff has also not **expressly pleaded** that he suffered any loss or damage as a

result of breach of duty of care. Thus, the formulation of paragraphs 8 -10 is inexcusably inaccurate and improper. In paragraph 8 of the proposed amended Statement of Claim the word **"negligent"** and in paragraph 9 the word **"neglected"** is used, but unless a duty is shown to exist the breach of which gives a cause of action , the mere use of the words "negligent " and "neglected" carries the case no further. This is an inevitable conclusion in the circumstances. People are not to be brought into court on a vague and most improper charge of negligence of this kind.

Leave that aside for a moment!

The alleged claim in negligence (if he has one) arose out of the Defendant's obligation to transfer Lot-1 to the Plaintiff under Clause – 2 of the purported Sale and Purchase Agreement, dated 14th November 2005. (See, annexure marked RS-1 and referred to in the supporting affidavit of Rajesh Patel, sworn on 11th September 2014,)

Clause 02 of the Sale and Purchase Agreement provides;

COVENANT TO SELL AND PURCHASE

The Vendor will sell and the Purchaser will purchase the said 3.5998 hectares land marked in red as Lot 2 and the said 1.2132 hectares land marked in the red as Lot 1 being part of Certificate of Title No. 23808 Lot 3 DP 5734 as the said land will stand on the date of execution of the sale and purchase agreement herein for the price and upon and subject to the terms and conditions hereinafter appearing. The purchaser shall within six (6) months from the date of settlement, subdivide the property at its costs and transfer to the vendor the title to the land marked in Green as Lot 1, free of any encumbrances or charges.

The settlement date was 05th December 2005. Thus, the Plaintiff's cause of action (if he has one) arouse out of negligence which amounts to breach of contract accrued on 04th June 2006.

Section 4 of the Limitation Act provides:

"Limitation of actions of contract and tort, and certain other actions

*4.-(1) The following actions **shall not brought after the expiration of six years from the date on which the cause of action accrued,** that is to say –*

*(a) actions founded on simple contract or **on tort;***
(b) actions to enforce a recognizance;
(c) actions to enforce an award, where the submission is not by an instrument under seal;
(d) actions to recover any sum recoverable by virtue of

any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:

Provided that –

(i) in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the Plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and

(ii) nothing in this subsection shall be taken to refer to any action to which section 6 applies." (our emphasis)

The original Writ was issued on 06th May 2015. Thus, the Plaintiff has brought the action after the expiration of 06 years from the date on which the cause of action accrued.

O.20 r. 5(2) and (5) of the High Court Rules allow the Court a discretion to allow an amendment which introduces a new cause of action after the expiry of a limitation period but this is subject to the important condition that the limitation period should have expired after the writ was filed. O.20 r.5 (2) states as follows:

"(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) ***is made after any relevant period of limitation current at the date of issue of the writ has expired,*** *the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.*

(Emphasis added)

Thus, it is crystal clear that the Plaintiff seeks to introduce a cause of action that has already expired when the Writ was originally filed. Therefore, the Plaintiff's claim in negligence relating to transfer of Lot – 1 is time barred and has no prospect of success.

I am of course mindful that an application seeking leave to amend a Statement of Claim will be refused if it is clear that the proposed amendment has no prospect of success. See;

- **Oil & Minerals Developments Corporation v Saijad 03.12.2001, unreported, QBD**

- **Groveholt Ltd v Hughes (2010) EWCA**

- **Civ. Group Inc. v T & N Ltd 19.12.2001, unreported, QBD**

(9) Turning now to paragraph 13-20, as I understand, the thrust of paragraph 13 to 20 of the proposed Amended Statement of Claim is to plead "Yue Lai" (the purported 2nd Defendant) and "Vuvale" (the Defendant) **colluded to defraud the Plaintiff.**

For the sake of completeness, paragraph 13 to 20 is reproduced below in full.

Para *13.* *The 2nd Defendant is a limited liability company having its registered office at 1st Floor, Harifam Centre, Suva.*

14. *That the Plaintiff has an interest in the Certificate of Title no. 23803 Lot 3 DP 5734.*

15. *That the 2nd Defendant entered into a Sales and Purchase agreement with the 1st Defendant to purchase Certificate of Title No. 23803 Lot 3 DP 5734, Malaqereqere, Sigatoka without the Plaintiff being a party (said property).*

16. *That the said property was registered unto the name of 2nd Defendant on 23 June 2015.*

17. *That the 2nd Defendant neglected and/or failed to inform the Plaintiff to participate in the drafting or be part of the agreement between the Defendants.*

18. *That the 2nd Defendant with the knowledge that the Plaintiff has interest in the land failed to preserve the Plaintiff's interest in the Sales and Purchase agreement.*

19. *That the 2nd Defendant with the knowledge that the Plaintiff has interest in the land failed to preserve the Plaintiff's share on the proceeds of sale.*

20. ***That the 1St and 2nd Defendant colluded with each and to defraud the Plaintiff of his interest on the land.***

(Emphasis added)

In the proposed amendment **there is no specific pleading of fraud.** It is settled law and practice that any allegation of **fraud must be expressly pleaded** together with the facts, matters and circumstances relied on to support the allegation.

Order 18, rule 11 provides;

Particulars of pleading (O.18, r.11)

11. – (1) Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing word-

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

(2) Where it is necessary to give particulars of debt, expenses or damages and those particulars exceed 3 folios, they must be set out in a separate document referred to in the pleading and the pleading must state whether the document has already been served and, if so, when, or is to be served with the pleading.

(3) The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.

(4) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then without prejudice to the generality of paragraph (3) the Court may, on such terms as it thinks just, order that party to serve on any other party.

(a) where he alleges knowledge, particulars of the facts on which he relies, and
(b) where he alleges notice, particulars of the notice.

(5) An order under this rule shall not be made before service of the defence unless, in the opinion of the Court, the order is necessary or desirable to enable the defendant to plead or for some other special reason.

(6) Where the applicant for an order under this rule did not apply by letter for the particulars he requires, the Court may refuse

to make the order unless of opinion that there were sufficient reasons for an application by letter not having been made.

(7) Where particulars are given pursuant to a request, or order of the Court, the request or order shall be incorporated with the particulars, each item of the particulars following immediately after the corresponding item of the request or order.

The White Book on page 330 at 18/12/17 states:

*"(15) Fraud – Fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts (**Davy v Garret (1878) 7 Ch.D 473 at 489; Behn v Bloom (1911) 132 L.T.J. 87; Claudius Ash Sons & Co. Ltd v Invicta Manufacturing Co. Ltd (1912) 29 R.P.C. 465, HL).***

As pointed out by **"Odgers" ' Principles of Pleading & Practice in Civil Actions in the High Court of Justice' (22nd Ed. P 100),** the acts alleged to be fraudulent should also be set out and then it should be stated that those acts were done fraudulently.

See; **Re Rica Gold Washing Co (1879) 11 Ch.d 36**

Furthermore, although there is discretion to allow such amendments at an early stage, Courts are generally reluctant to add a claim based on fraud on amendment.

The White Book at 20/8/23, pp 387 – 388 states:

*"... Although it has been stated that it is "the universal practice, except in the most exceptional circumstances, not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance" (per Lord Esher M.R. in **Bently v. Black (1893) 9 T.L.R. 580; cf. Hendricks v Montaga (1881) 17 Ch. D. 638 at 6421; Symonds v City Bank (1885) 34 W.R. 364; Lever v Goodwin [1887] W.N. 107, CA)** yet such an amendment may be allowed at an early stage."*

There is not a word of exceptional circumstance in the Plaintiff's supporting affidavit to allow an amendment for the purpose of adding a plea of fraud where fraud has not been in the first instance.

One which I think worth mentioning is that it is not sufficient to allege that 'Vuvale' and 'Yue Lai' colluded with each to defraud the Plaintiff of his interest on the land.

How have they colluded? I cannot find out. The Plaintiff ought to say the facts which constitute collusion. So the Defendants may know what they have to meet. By the rules of pleading I apprehend that every fact must be stated which would have to be proved to support a cause of action. Therefore, really, when the proposed amended Statement of Claim is fairly looked at, there is no proper allegation of fraud.

Thus, the amendment which relates to 'Yue Lai' is vague and most improper.

(10) The Court's jurisdiction to join a party is conferred by O.15, r.4 which provides:

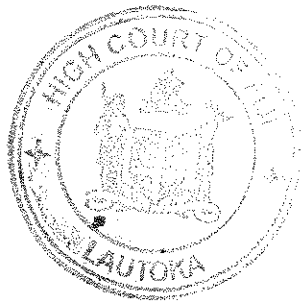
> ***"Joinder of parties** (O.15, r.4)*
>
> *4. –(1) Subject to rule 5 (1), two or more persons may be joined Together in one action as plaintiffs or as defendants with the leave of the Court or where –*
>
> *(a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions, and*
>
> *(b) all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.*
>
> *(2) Where the plaintiff in any action claims any relief to which any other person is entitled jointly with him, all persons so entitled must, subject to the provisions of any Act and unless the Court gives leave to the contrary, be parties to the action and any of them who does not consent to being joined as a plaintiff must, subject to any order made by the Court on an application for leave under this paragraph, be made a defendant.*

In this case, as I mentioned earlier, the amendment which would relate to **Yue Lai** is vague and most improper and should not be allowed. Thus, there are no grounds for joining Yue Lai.

(F) FINAL ORDERS

(1) The Plaintiff's application seeking leave to amend the Writ and the Statement of Claim is refused.

(2) The Plaintiff to pay costs of $1000.00 (summarily assessed) to the Defendant within 14 days hereof.



25/11/2016.

.....

Jude Nanayakkara

Master .

At Lautoka.

25th November 2016