

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 128 of 2007

BETWEEN : **BIRONDA FIJI LIMITED** t/a **TRUE BLUE HOTEL** a limited liability company incorporated under the laws of Fiji

FIRST PLAINTIFF

A N D : **SHANIL NAIDU** father's name Chinmunsami Naidu of Koala Way, Horsley Park, New South Wales 2175, Australia, Businessman/Managing Director

SECOND PLAINTIFF

A N D : **AVINESH CHANDRA NAIDU** father's name Muthu Krishan Naidu of Sigatoka, Nadroga/Navosa, Fiji, Medical Practitioner as a trustee of the Sigatoka Club

FIRST DEFENDANT

A N D : **SIGATOKA CLUB** a club duly registered under the Registration of Clubs Act (as amended)

SECOND DEFENDANT

Counsel : Mr S Krishna for plaintiff/applicant
 Mr E Narayan for defendant/respondent

Date of Hearing : 21 July 2016
Date of Ruling : 02 August 2016

R U L I N G

Introduction

[01] This is an application for leave to amend the statement of claim.

[02] By summons dated 6 June 2016 and filed 24 May 2016 (the application) the plaintiff seeks leave of the court to amend the First Amended Statement of Claim in the matter.

[03] In support of the application, the plaintiffs rely on the affidavit in support and affidavit in reply sworn by Shanil Naidu, the second plaintiff on 23 May and 18 July 2016 respectively.

[04] The defendants opposing the application, filed an affidavit of Krishna Rattan Bhan, elected president of the Sigatoka Club (the second defendant) sworn on 29 June 2016.

[05] The application is made under Order 20 Rule (5) of the High Court Rules, 1988 ('HCR') and the inherent jurisdiction of the Court.

[06] At the hearing, both parties orally argued the matter and tendered their respective written submissions.

Background

[07] Precisely, the background facts are as follows: the plaintiff filed writ of summons and Statement of Claim in April 2007 (Civil Action No. 128 of 2007) and amended the statement of claim in July 2012 (First Amended Statement of Claim) and claimed specific performance and punitive and special damages with certain injunctive orders against the defendant. The claim against the defendant arises out of a Tenancy Agreement entered into between the parties in June 2003 for a period of 12 years commencing on 1 November 2003 and with an option to renewal for a further period of 3 years.

[08] In September 2012 the defendant filed the first amended statement of defence and counterclaimed, amongst other things, vacant possession and damages.

[09] The matter is set down for trial on 12 August 2016. In the meantime the plaintiff seeks leave of the court to amend the statement of the claim for the second time.

The Law

[10] The plaintiff seeks leave of the court to amend the statement of claim. Therefore the applicable rule is HCR, O. 20, r. 5, which, so far as material, reads as follows:

Amended of writ or pleading with leave (O.20, r.5)

*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.***

...

*(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.*

Determination

[11] The plaintiff application seeking leave of the Court to amend the statement of claim for the second time emerges some four years after filing the first amended statement of claim in July 2012. Obviously, the application for amendment is filed a few weeks ahead of the trial date, being 12 August 2016.

[12] According to the plaintiff the proposed amendment is necessary in order to determine the real controversy between the parties. The plaintiff submits that the proposed amendment arises out of the same facts in respect of which relief has already been sought.

[13] The proposed amendment claims the following relief:-

“WHEREFORE the Plaintiffs seek the following orders against the Defendants:

- a) *Specific performance of the Tenancy Agreement dated 6th June, 2003.*
- b) Declaration that the Plaintiffs are entitled to the Tenancy of the Subject property till November, 2018 (proposed).**
- c) *An Order that the Defendants do not interfere and/or disrupt the Plaintiff business operation, restaurant, bar and/or guests at the Premises.*
- d) *An Order that the Defendants give an extra key to the locked gates on the Premises in the front and back of the Property giving access to the room accommodation.*
- e) *An Order that the Defendant give adequate parking space to the Plaintiff and its customers and/or guests;*
- f) General damages (proposed)**
- g) *Interest*
- h) *Punitive damages and special damages against the Defendant*
- i) *Costs on a solicitor/client indemnity basis and*
- j) *Further orders deems just by this Honourable court.”*

[14] It will be noted that the orders in prayer (b) and (f) are not in the first amended statement of claim. Basically, the plaintiffs intend to add these claims ('b' & 'f') by the proposed amendment to the statement of claim.

[15] Counsel for the defendants submits that the defendants object to the proposed amendment on the grounds that; (a) True Blue Hotel initiated the action in 2007 and had ample opportunity to amend its pleadings; (b) the Lease Agreement entered into in 2005 by the parties was terminated because of breach of the terms and conditions in not paying rental and which later expired on 1 November 2015; (c) there is

no need for any amended pleadings to be filed at this stage of the proceedings; (d) the proposed amendment in the pleading do not make the issues for determination any clearer and/or clear any defect or errors in the pleadings; and (e) there are no reasons as to why amendments should be allowed in the statement of claim at this juncture of the proceedings.

[16] The only issue to be decided by the court in this application is whether the proposed amendment 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.

[17] The proposed amendment includes two additional orders in the prayer as stated in para 13 above.

[18] The proposed prayers- '(b) **Declaration that the Plaintiffs are entitled to the Tenancy of the Subject property till November 2018** and (f) **general damage** that are intended to add in the claim by way of amendment are, in my opinion, arising out 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 plaintiff namely the Tenancy Agreement and its alleged breach.

[19] The court has discretion to allow the plaintiff to amend his writ at any stage of the proceedings, or any party to amend his pleading, on such terms as to costs or otherwise as may be just (see HCR, O.20, r.5 (1)).

[20] In ***Peter Sujendra Sundar & Anor v Chandrika Prasad*** [1997] ABU 22/97 (apf HBC 233/93) Decision 10 November 1997 at 9, Tikaram, JA held that:

"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...However, the later the amendment the greater is the chance that it will prejudice other parties or cause significant delays, which are contrary to the interest of the public in expeditious conduct of trials. When leave to amend is granted, the party seeking the amendment must bear the costs of the party wasted, as a result of it"

[21] Pathik, J *in Fiji Electricity Authority v Suva City Council* [2000] 1 FLR 114; HBC 901/84S (5 August 1994) said that 'at any stage of the proceedings' in O.20, r.7 (1) would cover [any stage of the proceedings] before judgment.

[22] Moreover, an amendment may be allowed 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 (HCR, O.20, r.5 (5)).

[23] As I see the proposed amendment, it does not envisage to adding or substituting a new cause of action. It only attempts to add some additional facts and to amend the prayers, which are arising out of the same facts as cause of action in respect of which relief has been already claimed by the plaintiff. The orders the plaintiffs seek to add by way of amendment arises out the same cause of action-breach of Lease Agreement entered into between the parties. I am satisfied that the proposed amendments are necessary to settle the real controversy between the parties. I would therefore grant leave to the plaintiff to amend the first amended statement of claim as proposed.

[24] The party making the application for amendment must bear the costs. The proposed amendment is made belatedly. The application for

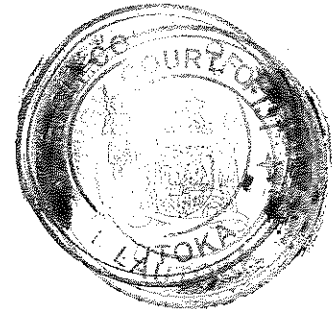
amendment is made some 4 years after the first amended statement of claim filed in July 2012 and when the cause has been set down for trial. However, there is no injustice if the other side can be compensated with costs. I therefore, taking all into my account, summarily assessed the costs to be paid by the plaintiff to the defendants at \$2,500.00.

Final Orders

- 1) Leave granted to the plaintiffs to amend the first amended statement of claim, as proposed in the proposed amendment.
- 2) The plaintiff will file and serve the amended statement of claim in three (3) days.
- 3) The defendant will file and serve amended statement of defence in three (3) days thereafter.
- 4) The plaintiff will pay summarily assessed costs of \$2,500.00 to the defendants in 14 days.
- 5) There will be no change in the trial date of 12 August 2016.

M.H. Mohamed Ajmeer
2/8/16

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M.H. Mohamed Ajmeer
JUDGE



At Lautoka

02.08.2016