

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 013 of 2011

BETWEEN : **AEROLINK AIR SERVICES PTY LIMITED** an Australian Corporation having its office at c/- Downes Barrington (St. George), Suite 16, Level 3, 4 Cross Street, Hurstville, New South Wales 2220, Australia.

FIRST PLAINTIFF

AND : **DANIEL PATRICK RYAN** of 268 Cicada Glen Road, Ingleside, New South Wales 2101, Australia, Company Director.

SECOND PLAINTIFF

AND : **SUNFLOWER AVIATION LIMITED** a limited liability company having its registered office at Sunflower Hanger, London Avenue, Nadi Airport, Fiji Islands.

FIRST DEFENDANT

AND : **ROSHAN ALI** of Nadi as the sole surviving Executor and Trustee of the Estate of **DONALD IAN COLLINGWOOD** late of Fasa Subdivision, Nadi Retired Person Testate.

SECOND DEFENDANT

Mr. Chen Bunn Young for the Plaintiffs
Mr. Krishneel Rajilesh Prasad for the Defendants.

Date of Hearing :- 05th December 2016
Date of Ruling :- 10th March 2017

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Plaintiff's Summons dated, 15th June 2016, made pursuant to **Order 20, rule 5 of the High Court Rules, 1988** and the inherent jurisdiction of the Court seeking the grant of the following Orders;

- ❖ The Plaintiff be at liberty to amend its Statement of Claim generally.
- ❖ That the costs of this application be costs in the cause.

(2) The Plaintiffs relied on the grounds set forth in the affidavit of 'Anand Vikash Badlu' filed on 03rd June 2016.

(3) The 'Summons' is strongly contested by the Defendants. The Second Defendant filed an 'Affidavit in Opposition' sworn on 13th July 2016, opposing the application for amendment of Statement of Claim. The Plaintiffs did not file an 'Affidavit in Reply'.

(4) The Plaintiffs and the Defendants were heard on the Summons. They made oral Submissions to Court. In addition to oral submissions, Counsel for the Plaintiffs and the Defendants filed written submissions for which I am most grateful.

(B) THE FACTUAL BACKGROUND

(1) What are the circumstances that give rise to the present application?

On 04th day of February 2011, the Plaintiffs instituted the above action herein by way of Writ of Summons.

The First Plaintiff is an Australian Corporation able to sue and be sued in its corporate name. The Second Plaintiff is a Company Director of the First Plaintiff.

The First Defendant is a Fiji Corporation able to sue and be sued in its corporate name. The Second Defendant, Donald Ian Collingwood is a Company Director of the First Defendant. The Second Defendant is now deceased and the estate has been enjoined based on the Probate and Will.

What is the history of "Commercial dealings" between the parties?

The First Plaintiff would normally supply spare parts and loan its aircrafts to the First Defendant and on behalf of the First Defendant, the Second Defendant would hire the aircrafts to use in its domestic airline services.

(2) With that short introduction, let me set out the relevant facts;

The Plaintiffs in their Statement of Claim plead *inter alia*; (as far as relevant)

Contract Claim

Para 5. By an agreement entered into on or around 31 January 2005 , the First Plaintiff agreed to leave two Embraer Bandeirante aircraft to the First Defendant for a period of 12 months, with a month to month option after the expiration of the 12 month period (the Contract)

Particulars

- (a) Memorandum of Understanding dated 31 January 2005, signed on behalf of the First Defendant;*
- (b) Related oral conversations.*
- 6. The Contract, signed on behalf of the First Defendant, was transmitted by facsimile from the First Defendant to the First Plaintiff on or around 31 January 2005.*
- 7. The first aircraft, with registration number DQ-WBI (the First Aircraft) was provided to the First Defendant in about late February 2005.*
- 8. The second aircraft, with registration number VH-OZF (the Second Aircraft), was to be provided to the First Defendant when it was "required".*
- 9. It was an implied term of the Contract that the Second Aircraft would be required by the First Defendant within a reasonable time.*
- 10. In breach of the Contract, the First Defendant failed to pay any lease payments to the First Plaintiff for the first Aircraft.*
- 11. In breach of the Contract, the First Defendant failed to require the Second Aircraft within a reasonable time.*
- 12. In breach of the Contract, the first defendant failed to pay any lease payments to the First Plaintiff for the Second Aircraft.*
- 13. As a consequence of the matters set out above, the First Plaintiff has suffered loss and damage and a debt is owed by the First Defendant to the First Plaintiff.*

Particulars

- (a) Unpaid lease payments in the sum of AUD\$180,000 for the First Aircraft for the first 12 months, and on going monthly payments of AUD\$15,000 until the date the First Aircraft is returned.
- (b) Unpaid lease payments in the sum of AUD\$120,000 for the Second Aircraft;
- (c) Expenses associated with mechanical work undertaken in relation to the First and Second Aircraft;
- (d) Further particulars will be provided in due course.

Estoppel

14. Further, or in the alternative, the First Defendant by its Director the Second Defendant, and the Second Defendant in his own capacity represented that a binding agreement had been reached between the First Plaintiff and the First Defendant in accordance with the terms of the Contract defined above the **(Contract Representation)**.

Particulars

- (a) Oral conversations between the Second Plaintiff and the Second Defendant in and around December 2004 and January 2005;
 - (b) Memorandum of Understanding dated 31 January 2005, signed on behalf of the First Defendant as authorised by the Second Defendant;
 - (c) The conduct of the Defendants.
15. In reliance upon that representation the First Plaintiff incurred expenses undertook obligations:

Particulars

- (a) Incurred expenses for the First Aircraft to transport the First Aircraft to the First Defendant's hangar and for maintenance work to be carried out on the First Aircraft to provide the First Defendant with a fully serviced aircraft ready to be operated by the First Defendant;

- (b) *Incurring expenses on the Second Aircraft to provide the First Defendant with a fully serviced aircraft ready to be flown to Fiji to be operated by the First Defendant;*
- (c) *Supplied spare parts to the First Defendant for use by the First Defendant to maintain the First Aircraft;*
- (d) *Supplied additional spare parts to the First Defendant to assist the First Defendant in complying with Civil Aviation Authority of the Fiji Islands regulations and requirements;*
- (e) *Further particulars will be provided in due course.*

16. *In reliance upon that representation the Second Plaintiff incurred expenses and undertook obligations:*

Particulars

- (a) *Settled on a loan to purchase the Second Aircraft on 7 February 2005;*
- (b) *Further particulars will be provided in due course.*

17. *The First and Second Defendants were aware of the fact that expenses were being incurred and obligations being undertaken by the First and Second Plaintiffs.*

18. *As a consequence of the matters referred to above, it would be unconscionable to allow the First Defendant to resile from its representation that a binding contract had been entered into between it and the First Plaintiff and the First Defendant is therefore estopped from denying a binding contract came into effect between the First Defendant and the First Plaintiff on or around 31 January 2005 or once the First Defendant became aware of the expenses that were being incurred by the First Plaintiff.*

Conduct in contravention of Section 75, 77 (1) (d) and 77 (1) (j) of the Commerce Commission Decree 2010.

- 19. *Further, or in the alternative, in the event the Contract is not held to be binding, the Contract Representation made by the First and Second Defendants was in the circumstances;*
 - (a) *Misleading and deceptive conduct in contravention of Section 75 of the Commerce Commission Decree 2010; and*
 - (b) *Conduct in contravention of Section 77 (1) (d) of the Commerce Commission Decree 2010.*

20. *As a consequence of the First and Second Defendant's misleading and deceptive conduct the First Plaintiff has suffered loss and damage.*

Particulars

(a) *The First Plaintiff refers to and repeats the particulars at paragraph 15 above;*

(b) *Further particulars will be provided in due course.*

21. *As a consequence of the First and Second Defendant's misleading and deceptive conduct the Second Plaintiff has suffered loss and damage.*

Particulars

(a) *The Second Plaintiff refers to and repeats the particulars at paragraph 16 above;*

(b) *Further particulars will be provided in due course*

22. *Further, or in the alternative, the First Defendant by its Director the Second Defendant and by the Second Defendant in his own capacity represented that it was their intention to lease the First and Second aircraft from the First Plaintiff in accordance with the Memorandum of Understanding dated 31 January 2005 (the Intention Representation).*

Particulars

(a) *Oral conversations between the Second Plaintiff and the Second Defendant on and around December 2004 and January 2005;*

(b) *Memorandum of Understanding dated 31 January 2005, signed on behalf of the First Defendant as authorised by the Second Defendant;*

(c) *The conduct of the Defendants.*

23. *The Intention Representation was a continuing representation.*

24. *The Intention Representation became false at some time in or around May 2005 when the First and Second Defendants no longer held that intention.*

25. *In reliance on the continuing representation, the First Plaintiff incurred expenses and obligations.*

Particulars

(a) The First Plaintiff refers and repeats the particulars in paragraph 15 above.

26. *In reliance on the Intention Representation, the Second Plaintiff incurred expenses and obligations.*

Particulars

(a) The Second Plaintiff refers to and repeats the particulars in paragraph 16 above.

27. *The failure by the First and Second Defendants to correct the continuing Intention Representation once it had become false, was in the circumstances:*

(a) Misleading and deceptive conduct in contravening of Section 75 of the Commerce Commission Decree 2010;

(b) Conduct in Contravention of Section 77 (1) (d) of the Commerce commission Decree 2010;

(c) Conduct in contravention of Section 77 (1) (j) of the Commerce Commission Decree 2010.

28. *As a consequence of the matters referred to above, the First and Second Plaintiffs have suffered loss and damage.*

Particulars

(a) The Plaintiffs repeat the particulars in paragraphs 15, 16, 20 and 21 above.

29. *The Plaintiffs say that they are entitled to interest on all sums awarded pursuant to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act Cap 27 – and it asks this Court so Order.*

In the Statement of Claim, the Plaintiffs seek the following reliefs;

- A. *Damages and/or equitable damages or compensation.*
- B. *Interest pursuant to the Law Reform (Miscellaneous Provisions) (Death and Interest) Act. Cap. 27*
- C. *Post judgment interest of 4% per annum from the date of final judgment to the date of full satisfaction of the judgment sum.*
- D. *Costs.*
- E. *Such further or other Orders as the Court thinks fit.*

(3) The First and the Second Defendants filed their Statement of Defence along with a Counter Claim and in their Statement of Defence they have pleaded;

- ❖ There was to be executed, an operating lease between the First Plaintiff and Second Defendant and it was not executed because the Plaintiffs were not able to provide aircrafts in Operational Order.
- ❖ The first aircraft did not have a Certificate of Airworthiness and the Plaintiffs were obliged to provide the same to the Defendants before the aircraft could be used.
- ❖ The Plaintiffs failed to provide the first aircraft with a valid Certificate of Airworthiness. As a result, the Defendants could not use the first aircraft. Therefore, the Defendants suffered substantial loss, damages, loss of business.
- ❖ The Plaintiffs failed to remove the first aircraft from the Defendant's hanger despite being requested.
- ❖ The Plaintiffs owed the Defendants a sum of \$36,000.00 for the continued occupation in the hanger.
- ❖ Moreover, the Plaintiffs owe the Defendants a sum of \$50,966.16 being expenses related to the maintenance and other expenses incurred by the Defendants on the said aircraft.

(4) The First and Second Plaintiffs filed a reply to Defence and Defence to counter claim and submitted that the First and Second Plaintiffs were not obliged to provide Certificate of Air worthiness under the Contract.

- (5) In the instant case, the Writ of Summons was filed on 04th February 2011. The Statement of Defence and the Counter claim was filed on 24th January 2012. The reply to Defence and the Defence to Counter Claim was filed on 23rd February 2012. The Pleadings were closed on 07th March 2012. The matter is now at the Pre-Trial Conference stage. The proceedings have taken on a marathon character. The Plaintiff's application to amend the Statement of Claim was filed on 15/6/2016. I note without comment, that the Plaintiffs application to amend the Statement of Claim was filed about 5 years after the Writ was issued and about 4 years after the close of the pleadings.

(C) **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 Plaintiffs now seek.
- (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 remain in play.
- (3) This is **primarily** the Plaintiffs application to amend its 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).”

(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).

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).

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 Veritas Ltd [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 it 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.”

(D) ANALYSIS

- (1) The Plaintiffs in their application to amend the statement of Claim sought to add three (03) paragraphs (alleging inducement) to the existing Statement of Claim.

The proposed three paragraphs are annexed and marked with letter “AVB-1” to the Affidavit of ‘Anand Vikash Badlu’ sworn on 03rd June 2016.

- (2) The Defendants principal objections to the Plaintiffs application to amend the existing Statement of Claim are as follows; (I focus on paragraphs 07 to 18 of the Defendants (Roshan Ali's) Affidavit in Opposition)

- Para 7. *THAT the proceedings herein were instituted by the Plaintiffs on the 4th day of February 2011.*
8. *THAT a Statement of Defence was filed on the 24th day of January 2012 whilst Donald Ian Collingwood was still alive.*
9. *THAT after the death of Donald Ian Collingwood on the 14th day of September 2013 the executors of his estate were substituted in the proceedings herein in place of the late Donald Ian Collingwood.*
10. *THAT the amendments proposed by the Plaintiffs seek to add allegations of inducement by the late Donald Ian Collingwood of which I as the Executor & Trustee of his estate have no knowledge of and therefore would not be in a position to defend the allegations made by the Plaintiffs.*
11. *THAT the allegations made by the Plaintiffs in the proposed amendment refers to alleged intentions of the late Donald Ian Collingwood which I am not aware of.*
12. *THAT the Plaintiffs had since the year 2011 to the year 2013 every opportunity to amend the Statement of Claim so as to allow the late Donald Ian Collingwood to file a defence to the allegations made against him personally however failed to do so.*
13. *THAT now that the said Donald Ian Collingwood is now deceased the Defendants would be greatly prejudiced if the Plaintiffs are allowed to amend the claim as the Defendants would not be in a position to defend the allegations made against the late Donald Ian Collingwood personally.*
14. *THAT I am advised by the Defendant's solicitors and verily believe that the substantive claim is at the pre-trial conference stage where parties are to file pre-trial conference minutes and thereafter the matter can be fixed for trial.*
15. *THAT this is an old matter which commenced in the year 2011 and therefore any delay would be prejudicial to the Defendants as the Defendants continue to incur costs of litigation.*
16. *THAT I am advised by the Defendant's solicitors and verily believe that the Defendants solicitors had put the Plaintiffs on notice to amend the Statement of Claim sometime on or about the year 2014 however despite this the Plaintiffs failed to file an application for amendment which resulted in the Defendants filing the application to strike out the claim against the 2nd Defendant on the grounds that there was no valid cause of action against the 2nd Defendant. At that material time the Plaintiffs could have filed an application however did not do so.*

17. *THAT the Plaintiffs do not wish to include any new facts in the proposed amendment therefore at the time of filing the Statement of Claim all facts were within the knowledge of the Plaintiffs and therefore ought to have been pleaded at that time.*
18. *THAT the Plaintiffs have failed to prosecute their claim with diligence and have caused substantial delays in the proceedings therefore costs would not be adequate compensation as the Defendants would be greatly prejudiced by not being able to properly defend the claim due to the nature of the allegations proposed in the amendment and furthermore because to allow the amendment would delay the matter from reaching trial on events that are alleged to have taken place on or about the year 2005.*

(3) Unfortunately, the Plaintiffs did not respond to the Defendants Affidavit in Opposition. Therefore, it is important to remember that the matters raised in the Defendants Affidavit in Opposition remain uncontroverted and untraversed. Thus, I hold the inference inescapable that the Plaintiffs do not dispute the matters raised in the Defendants Affidavit in Opposition.

See; **Jai Prakash Narayan v Savita Chandra**
Civil Appeal No:- 37 of 1985.

I am content to adopt the same approach!

(4) Leave that aside for a moment!

I focus on paragraphs (4), (5) and (6) of the Plaintiff's written submissions. They are in these terms;

- Para 4. The purported grounds of objection that 'the Defendants would be greatly prejudiced' as set out in paragraph 13 Roshan Ali's Affidavit are without merit because there is no evidence but a mere assertion. (See Bidder v Bridges 1884 Ch D vol. XXVI)*
5. *Without the amendment, the original statement of claim refers conversations between the 2nd Plaintiff (Daniel Ryan) and the 2nd Defendant (Donald Collingwood). The 2nd Defendant had no complaint about the allegation when she sought to be substituted as a party. The 2nd Defendant had also earlier filed a Defence and counter-claim on 21st March 2012. So to take the Defendant's on grounds of objection to its logical conclusion what the Defendants are saying that they cannot answer the amendment because the "original" 2nd Defendant is deceased but have no problems with the answering existing statement of claim and as it stands along with its Defence and Counter-claim.*

6. For amendments the Court should take cognizant of the judgment of *FEA v Balram & Others* – Supreme Court Fiji [1972] Vol. 18 where it held:

“An amendment to pleadings may be permitted by the Court at any stage of the proceedings for the purpose of determining the real question in controversy and, if it can be made without injustice to the other side, should be allowed however late, and however negligent or careless may have been the first omission.”

- (5) 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”:

Let me now move to consider the Plaintiffs 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.

(6) I now return to the case before me, bearing the aforementioned principles uppermost in my mind. The question is this; whether the Plaintiffs should be allowed to amend their Statement of Claim?

(7) Let me have a close look at Plaintiffs Writ of Summons and Statement of Claim filed on 04th February 2011. [I have set out the Statement of Claim in detail in part “B” above].

As I understand it, the first cause of action pleaded against the Second Defendant (Donald Ian Collingwood – Deceased) is based on ‘Contract Representations’.

The particulars of alleged ‘Contract Representation’ are in these words; (Reference is made to paragraph 14 of the Statement of Claim)

Para 14. Further, or in the alternative, the First Defendant by its Director the Second Defendant, and the Second Defendant in his own capacity represented that a binding agreement had been reached between the First Plaintiff and the First Defendant in accordance with the terms of the Contract defined above the (Contract Representation).

Particulars

(a) Oral conversations between the Second Plaintiff and the Second Defendant in and around December 2004 and January 2005;

(b) Memorandum of Understanding dated 31 January 2005, signed on behalf of the First Defendant as authorised by the Second Defendant;

(c) The conduct of the Defendants.

The second cause of action is based on 'Conduct in Contravention of Sections 75, 77 (1) (d) and 77 (i) (j) of the Commerce Commission Decree 2010.

I focus on paragraph 19 of the Statement of Claim. It is in these words;

Conduct in contravention of Section 75, 77 (1) (d) and 77 (1) (j) of the Commerce Commission Decree 2010.

Para 19. Further, or in the alternative, in the event the Contract is not held to be binding, the Contract Representation made by the First and Second Defendants was in the circumstances;

(a) Misleading and deceptive conduct in contravention of Section 75 of the Commerce Commission Decree 2010; and

(b) Conduct in contravention of Section 77 (1) (d) of the Commerce Commission Decree 2010.

The third and final cause of action is based on 'Intention Representations'.

The particulars of alleged 'Intention Representations' are in these words; (Reference is made to paragraph 22 of the Statement of Claim)

Para 22. Further, or in the alternative, the First Defendant by its Director the Second Defendant and by the Second Defendant in his own capacity represented that it was their intention to lease the First and Second aircraft from the First Plaintiff in accordance with the Memorandum of Understanding dated 31 January 2005 (the Intention Representation).

Particulars

(a) Oral conversations between the Second Plaintiff and the Second Defendant on and around December 2004 and January 2005;

(b) Memorandum of Understanding dated 31 January 2005, signed on behalf of the First Defendant as authorised by the Second Defendant;

(c) The conduct of the Defendants.

(8) I am not unmindful that the Statement of Defence was filed on 24th January 2012 whilst Donald Ian Collingwood was alive. After the death of 'Donald Ian Collingwood' the Executor and Executrix of Donald Ian Collingwood was substituted as the Second Defendant in this action on 26th March 2014.

(9) 'Donald Ian Collingwood' died on 14th September 2013. After 02 years and 09 months, the Plaintiffs filed Summons seeking leave to add three paragraphs alleging 'inducement' against late 'Donald Ian Collingwood'. The amendment proposed is in these terms;

Para 19. *After the Contract was entered into, and/or signed by the 1st Defendant through its Financial Controller Ganga Gounder the 2nd Defendant thereafter induced the 1st Plaintiff:-*

(i) into thinking that the 1st Defendant was accepting that the Contract was binding on it;

(ii) to take steps in arranging for the Plaintiff to perform its obligations under the contract for the delivery of the two aircrafts to the 1st Defendant.

Particulars of Conduct

(i) conversations and correspondence between the 2nd Plaintiff and the 1st and/or the 2nd Defendants from February 2005 to August 2007.

(ii) the 2nd Defendant's request for the delivery of the first aircraft from the 1st Defendant and thereafter making arrangement to take delivery and/or possession of the same.

(iii) enquiring and requesting for the delivery of the second aircraft to be delivered to the 1st Defendant.

20. *In truth and in fact the 2nd Defendant well knew that when the 1st Plaintiff (through the 2nd Plaintiff) was making arrangements for the delivery of the first aircraft (and later a second aircraft) to the 1st Defendant, the 1st Defendant:-*
- (i) *had no intention of fulfilling its obligations under the Contract;*
 - (ii) *was in no position at the material time to fulfil its obligations under the Contract.*
 - (iii) *the 1st Defendant had no intention to honour its obligations under the Contract.*
21. *Being induced by the 2nd Defendant as aforesaid, the 1st Plaintiff took steps and committed itself to financial obligations including the incurring of expenses in order to allow the 1st Plaintiff to perform its obligations under the Contract.*

The Writ and the Statement of Claim alleges no 'inducement'. The proposed amendment charges the late 'Donald Ian Collingwood' with inducement. A cause of action is any fact which the Plaintiff has to prove in order to enable him to get the Judgment of the Court. This is a new cause of action within that definition. The proposed amendment sets up a new cause of action. Order 20, rule 5(5) allows an amendment 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.

The Plaintiffs in the present case have gone outside their Writ and the Statement of Claim. The Claims originally indorsed on the Writ was for damages for;

- ❖ **Contract Representations.**
- ❖ **Conduct in Contravention of Sections 75, 77 (1) (d) and 77 (1) (j) of the Commerce Commission Decree 2010.**
- ❖ **Intention Representations.**

The amendment which is proposed is based upon what I regard as something entirely different, not as a claim for contract representation, not as a claim for conduct in contravention of Sections 75, 77 (1) (d) and 77 (1) (j) of the Commerce Commission Decree 2010, and not as a Claim for Intention Representation.

As I read the proposed amendment, it involves a quite different set of ideas, quite different allegation of fact. In my view, therefore, the proposed amendment would, if allowed, will set up a new cause of action involving quite new considerations, quite new sets of facts and quite new cause of damage. With due respect to the forceful and tenacious argument of Counsel for the Plaintiffs, in my opinion, the proposed amendment involves a new departure, a new head of claim, or a new cause of action.

- (10) Quite clearly, as Counsel for the Defendants pointed out, the amendment proposed by the Plaintiffs seek to add allegations of inducement by the late 'Donald Ian Collingwood' of which the current Second Defendant who is the Executor & Trustee of the estate of previous Second Defendant have no knowledge and therefore would not be in a position to defend the allegation made in the proposed amendment.

In response Counsel for the Plaintiff submitted; (I focus on paragraph 5 of the Plaintiff's written submissions).

Para 5. Without the amendment, the original statement of claim refers conversations between the 2nd Plaintiff (Daniel Ryan) and the 2nd Defendant (Donald Collingwood). The 2nd Defendant had no complaint about the allegation when she sought to be substituted as a party. The 2nd Defendant had also earlier filed a Defence and counter-claim on 21st March 2012. So to take the Defendant's on grounds of objection to its logical conclusion what the Defendants are saying that they cannot answer the amendment because the "original" 2nd Defendant is deceased but have no problems with the answering existing statement of claim and as it stands along with its Defence and Counter-claim.

With all due respect to the argument, I am not at all persuaded by the submission of Counsel for the Plaintiffs. At this moment, I cannot resist in saying that it is not permissible to fashion legal principles or judicial procedures in someone's interest. One word more, the Plaintiff should not expect the court to assess the requirements of justice with its eyes in blinkers; it must look at all the circumstances.

The particulars of inducement in the proposed amendment are in this form;

Particulars of Conduct

- (i) *conversations and correspondence between the 2nd Plaintiff and the 1st and/or the 2nd Defendants from February 2005 to August 2007.*
- (ii) *the 2nd Defendant's request for the delivery of the first aircraft from the 1st Defendant and thereafter making arrangement to take delivery and/or possession of the same.*
- (iii) *enquiring and requesting for the delivery of the second aircraft to be delivered to the 1st Defendant.*

I cannot shut my eyes to the fact that the Executor and Trustee of the estate of late 'Donald Ian Collingwood' has no any **personal knowledge** whatever of the alleged particulars of inducement. It would be a most abominable oppression to call upon the Executor and Trustee of the estate of late 'Donald Ian Collingwood' to answer the

charge of inducement which he has no personal knowledge. That no doubt puts the Executor and Trustee of the estate of late 'Donald Ian Collingwood' into a very difficult position which could not be compensated for by costs or otherwise. The test as to whether the amendment should be allowed, is whether or not the Plaintiffs can amend without placing the Defendants in such a position that they cannot be recouped, as it were, by any allowance of costs, or otherwise.

I am quite clear that the Defendants would be damnified by the proposed amendment. I find it hard to believe that this court should be powerless to intervene to prevent such a manifest injustice.

I refuse leave to amend the Statement of Claim.

- (11) There is an overwhelming obstacle in the way of the Plaintiffs. Here the Statement of Defence was filed, as long as the 24th January 2012 whilst Donald Ian Collingwood was alive, and the Summons for leave to amend the Statement of Claim was not taken out until 15th June 2016.

There is not a word in the supporting Affidavit of 'Anand Vikash Badul' filed on 03rd June 2016, as to how a thoroughly competent Counsel who was employed by the Plaintiffs failed to apply for leave to introduce the allegation of inducement before the death of Donald Ian Collingwood.

Why did the Plaintiffs apply for leave to amend particulars of their claim by adding a paragraph alleging inducement after the death of Donald Ian Collingwood?

There is no explanation why this allegation of inducement had not been introduced before the death of 'Donald Ian Collingwood'. There is no Affidavit filed to inform the conscience of the Court as to the truth.

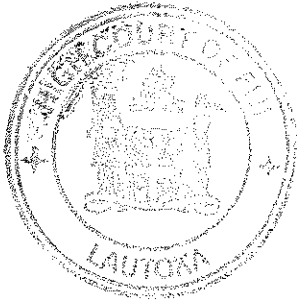
I am therefore of the view that the Plaintiffs are acting mala fide in relation to the proposed amendment. It is not hard to spell mala fide from the proposed amendment. Thus, I refuse leave to amend the Statement of Claim.


See; Lawrence v Norreup
(1890) 39 Ch. D. 213

In view of the approach I have adopted, I do not think that it is necessary for me to express my views on the issue of 'prospect of successes.'

(E) ORDERS

- (1) I refuse leave to amend the Statement of Claim.
- (2) The Plaintiffs are to pay costs of \$1000.00 (Summarily assessed) to the Defendants within 14 days hereof.




10/03/2017

Jude Nanayakkara
Master

At Lautoka
10th March 2017