

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO.: HBC 14 of 2017

BETWEEN : GOUNDAR SHIPPING LIMITED

PLAINTIFF

AND : INDUSTRIAL AND MARINE ENGINEERING
LIMITED

DEFENDANT

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr S Nandan [Reddy Nandan Lawyers]

DEFENDANT : Mr E Narayan [Patel Sharma Lawyers]

RULING OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 21 January 2018 

Interlocutory Ruling

[Joinder of Parties and Subsequent Amendments to Pleadings]

Application

1. On 18 January 2018, the Plaintiff filed an application pursuant to Order 20 rule 1 and 5 and Order 15 rule 16 of the High Court Rules seeking orders:
 - i. For Plaintiff to amend its Statement of Claim;
 - ii. For Plaintiff to add Asian Paints (South Pacific) Limited trading as Apco Coatings and Taubman Paints as second defendant to the proceedings.

They have in support of the application filed an Affidavit of one George Goundar sworn on 16 January 2018.

2. Said Application is opposed by the Defendant, who have on 20 April 2018 filed an Affidavit in Opposition of one Sheik Aiyaz.

Substantive Claim and Defence

3. The Plaintiff is engaged in the business of Shipping and related services in Fiji.

The Defendant provides Marine Engineering Services in Fiji.

In an agreement between the parties, the Plaintiff engaged the Defendant to carry out certain works on its vessel "Lomaiviti Princess II" said work was to be carried out from late October 2015 to early November 2015.

The work included but was not limit to:

- a) *Sea chest cleaning and painting;*
- b) *Cleaning of area below the water line by water blasting;*
- c) *Applying Anti Corrosive Material;*
- d) *Applying Anti Fouling material.*

There was expressed and/or implied terms and condition that the Defendant warranted:

- a) *The said works should be done well and efficiently and with skill and care in a proper workman like manner;*
- b) *The materials should be properly, well and skilful applied and used.*

According to the Plaintiff, some work was done in pretended performance of the Agreement with none of the work done in accordance of the agreement.

The Plaintiff alleges there was breach of the terms and conditions:

- *The said work was done badly, inefficiency and without skill and care and in an improper and workman like manner;*
- *The materials were applied and used badly and unskilfully as there was failure to apply anti corrosive and anti-fouling properly and failure to apply paint properly.*

The Plaintiff as a result has suffered loss and damages and put to trouble inconvenience delay and loss of business and profits.

4. The Defendant is engaged in the business of marine engineering along with inter general fitting and machining including blasting and painting.

On or about 28 October 2015, the parties entered into a Standard Ship Repair Contract.

The Defendant was to carry out and complete the work as per the scope of work and Plaintiff was to pay for the work when invoices were raised.

The scope of work was for "slipping and repairs "of the motor vessel "Lomaiviti Princess II". The necessary repair was conducted at the Defendant's Floating Dry Dock "Naiqasiqasi" at Walu Bay, Suva.

The consideration for the repair was \$74,762.96(VEP).

The vessel was docked at the "Naiqasiqasi" from 30 October 2015 till the 3 November 2015 and then from 01 August 2016 till the 2 August 2016.

The Plaintiff was quoted and agreed to pay \$74,762.93 (VEP) or \$85,977 (VIP).

The Plaintiff deposited \$5,000 to confirm space at the premises and further paid \$40,000 on 29 October 2015.

The necessary repairs were being undertaken by the Defendant as per the scope of work.

However the Plaintiff, through its Managing Director Mr. Subarmani Goundar aka George Goundar instructed the Defendant to alter and/or modify the scope of work.

As per the said alteration of the scope of work, the Defendant undertook and completed the necessary repairs on the vessel and accordingly raised an invoice on the balance sum outstanding being \$41,609.95 which Plaintiff refused to pay and which remains unpaid till to-date.

According to the Defendant, the said work and labour was done well and efficiency with skill and care in a proper and workman like manner.

It maintains the material used was good and suitable.

The work and labour done and material supplied were of said standard repair contract.

The initial instruction to the Defendant were to undertake hydro blasting of the hull of the vessel at 30,000 PSL and to paint the vessel with paints provided by the Plaintiff and/or its Supplier Taubman.

The Plaintiff in the presence of the supplier made alteration to the above scope of work. It instructed the Defendant to hydro blast the hull of the vessel to initially around 3,000 PSL to 5,000 PSL.

The Plaintiff noted that this pressure did not wash the barnacles and dirt off the hull of the vessel. Hence the instructed the Defendant to increase the pressure to around 17,500 PSL to 20,000 PSL and paint the vessel with the paints provided by the Plaintiff's supplier.

According to the Defendant, the Plaintiff had accepted and complimented the quality of work undertaken by the Defendant.

On promises made for payment on the invoice raised and endorsement by the Plaintiff, the Plaintiff was thereafter allowed to take the vessel out of the dry dock yard.

Grounds for Application for Amendment

5. The Defendant in its defence alleged that it had performed the works well, efficiency and in proper and workmanlike manner.
6. The Paint that was used for the woks were bought from Asian (South Pacific) Limited trading as Apco Coatings and Taubman Paints.
7. According to Taubman, the paints they supplied were fit for purpose and had provided a warranty for the paints for 5 years therefore peeling and growth should not have occurred.
8. According to the Plaintiff, that if the complaint of the Plaintiff was not a result if Defendant's prior performance of works, then the paint was not fit for purpose thus causing the peeling and growth.
9. They have been advised that this would be a matter for determination at trial thus requirement to add Taubman Paints as a party to ensure disputes be effectively and completely adjudicated.

Opposition to the Application

10. According to the Defendant, the Plaintiff has failed to provide a substantial ground to allow the joinder. There is no explanation for delay.

The Defendant will be prejudicially affected if amendment were allowed.

Law

11. Order 20 (5) of the High Court Rules provide:
 - i. *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 or her writ;on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct".*
12. Whilst Order 15 rule 6(2)(b) allows the court at any stage of proceedings on such terms as it thinks just order any of the following persons to be added as a party, namely –
 - i) *Any person who ought to have joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or*
 - ii) *Any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy which in the opinion of the court, it would be just and convenient to determine as between him or her and that party as well as between the parties to the case or matter.*

13. Master Tuilevuka [as he was then] whilst dealing with an application for amendment of Statement of Defence cited Brett Mr in **Claropede v. Commercial Union Association (1882) 82WR 262** who at 263 stated:

"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".

14. In the instance case the issue at trial would be whether work carried out by the Defendant was not in accordance to the Agreement or whether the proposed second named Defendant had breached in warranty by providing paint which was not fit for purpose and of merchantable quality.
15. For the Defendant they can be compensated by cost.
16. Hence Plaintiff is allowed to join Asia Paints (South Pacific) Limited trading as Apco Coatings and Taubman Paints as second Defendant to the proceedings.

Leave is granted for them to file and served amended Writ of Summons and statement of claim to the Defendants (as per the form in annexure A of the Affidavit of George Goundar). The same is to be done in 14 days.

17. The Plaintiff is further asked to pay cost summarily assessed at \$850 to the Defendant in 14 days.




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Vandhana Lal [Ms]
Acting Master
At Suva.