

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 139 of 2016

BETWEEN: **FIJI DEVELOPMENT BANK** a body corporate duly constituted under the Fiji development Bank Act, Cap 214 and having its principal office at 360 Victoria Parade, Suva in Fiji.

PLAINTIFF

AND: **NIU INDUSTRIES (FIJI) LIMITED** a limited liability company having its registered office at Shed 3, Fiji Ships & Heavy Industries Yard, Sannergren Drive, Walu Bay, Suva.

1ST DEFENDANT

AND: **CARL HARVIE PROBERT** of 32 Matanikutu Road, Suva, Company Director.

2ND DEFENDANT

AND: **CLIFTON JOHN GOUGH** of 1139 Yasi, Pacific Harbour, Company Director.

3RD DEFENDANT

BEFORE: Hon. Justice V D Sharma

COUNSEL: Mr. Nilesh Lajendra - for the Plaintiff
Ms. Fa F. - for the 1st and 2nd Defendants

Date of Ruling: 05th July 2019 @ 9.30 am. (B/F from 23rd July 2019)

RULING

*[Leave to Amend Statement of Defence pursuant to
Order 20 Rule 5 of the High Court Rules 1988]*

INTRODUCTION

1. Before court is 1st and 2nd Defendants Summons seeking for the following orders:
 - (a) That an Order that the 1st and 2nd Defendants be given leave to amend and file an Amended Statement Defence;
 - (b) That costs of this application be costs in the cause.
2. The application is made pursuant to *Order 20 Rule 5 of High Court Rules 1988* on the grounds contained in the Affidavit deposited by Finau Seru Nagera [Law Clerk] and subsequent Affidavit in Reply deposited by Carl Harvie Probert.
3. The Plaintiff **opposed** the application seeking leave to file Amended Statement of Defence of the 1st and 2nd Defendants.
4. Both parties to the proceedings filed written submission and argued the matter respectively.

THE LAW

5. The law in relation to amendments is well settled. *Order 20 Rule 5 of the High Court Rules, 1988* is the relevant provision coupled with several case authorities on this issue.
6. *Order 20 Rule 5* gives this Honourable court the power to allow for the seeking party, leave to amend their pleadings at any stage of the proceedings on the basis that such amendment sought is for the purpose of determining the real question in controversy between the parties to any proceeding.

Defendant's Case (Summarised)

7. The amendment sought is necessary and crucial to assist court to determine crux of the matter.
8. The substantive matter deals with a loan account whether the Defendants owe the Plaintiff a sum of \$147,718.05 on the Plaintiff's Amended Statement of Claim.
9. The Amended Defence raises issue with the Plaintiff continuing to allow the Defendants loan account to exist after continuous defaults on the part of the Defendants.
10. The Defendant argues that the loan amount claimed by the Plaintiff was arrived at illegally as the Defendants loan account was in default of three months of its starting date.
11. The terms of the loan agreement will highlight that the Plaintiff should not have allowed the loan period to continue since the Plaintiff knew the Defendants could not meet the requirements.

Plaintiff's Case (Summarised)

12. That the amendments proposed by the 1st and 2nd Defendants do not raise any real controversy between the parties.
13. The application for amendments shows that the 1st and 2nd Defendants propose to raise the defence of deception and misleading conduct on the part of the Plaintiff pursuant to *section 75(1) of the Commerce Commission Degree* to challenge the Plaintiff's claim.

14. The 1st and 2nd Defendants alleged that the loan account was constantly in arrears and the Plaintiff should have called the loan account in twelve months, instead the loan account continued for four years accumulating interest and unlawfully profiting.
15. The Defendants amendment application has no merit and is not bona fide and is not in any way putting the real controversy between the parties based on any evidence before the court to allow the amendment.
16. The proposed amendments sought by the Defendants are a sham.

The Test for Granting Amendments

17. The test to be applied is whether the amendment is necessary in order to determine the real controversy between the plaintiff and the defendants and that it does not result in injustice to the other party.

ANALYSIS AND DETERMINATION

18. I will now apply the test to determine the pending issue whether the Defendants' application seeking leave to amend and file an amended statement of defence be acceded to by this court?
19. The court notes that initially an oral application seeking leave to amend the Statement of Defence was made by the defence counsel before the closure of the Plaintiff's case. This application was opposed by the Plaintiff. The court ruled against the grant of the oral amendment sought therein and proceed to complete the Plaintiff's evidence.
20. The Plaintiff closed his case and the matter stood adjourned for continuation of hearing to 20th May 2019.
21. Subsequently, the 1st and 2nd Defendants filed a formal application and sought for an order for **leave to file an amended statement of Defence** returnable on 20th May 2019.
22. The application was **opposed** by the Plaintiff. The scheduled continuation hearing date of 20th May 2019 on the substantive matter had to be vacated in light of the **Defendants interlocutory application for leave to file an amended statement of Defence**.
23. The Defendants' current application was heard in terms of the oral and written submissions of both counsels on 18th June 2019.
24. The Defendants' contention is that the amendments sought herein are necessary and crucial to assist court in arriving at determining the crux of the matter.
25. That the amounts claimed by the Plaintiff were arrived at illegally since the Defendants loan account was in default within three months of its starting date. The Plaintiff should have called the loan agreement in where default occurs and continues to occur for some period of time.
26. The **issue** raised by the Defendants' in their draft amended statement of defence is a **legal issue**. The questions that arises are:

- (i) Whether the Plaintiff can continue to change the interest rate to the borrower, knowing that the loan account is in default?
 - (ii) Is this fair on the borrower then to do so?
 - (iii) Is it just and conscionable for this to continue?
27. On the other hand the **Plaintiff's contention** is that the amendments proposed by the Defendants does not raise any real controversy between the parties and therefore has no merits seeking amendments.
28. The 1st and 2nd Defendants proposed amendments raise **deceptive** and **misleading conduct** on the part of the Plaintiff pursuant to **Section 75(1) of the Commerce Commission Decree** to challenge the Plaintiff's claim.
29. The 1st and 2nd Defendants also raised the argument that the conduct of the Bank (FDB) was **unconscionable** allowing the loan account to accumulate **interest** for four years instead of calling up the loan in 12 months.
30. The Plaintiff has pleaded in his statement of claim at **paragraph 20** that the company's loan account with the Plaintiff continues to remain in arrears and as at **10th June 2016**. The total sum outstanding was \$147,718.05 with interest accumulating at the rate of 6% per annum.
31. The **Plaintiff's amended statement of claim** [Ruling of 14/05/19] is seeking judgment against the Defendants jointly and severally in the sum of \$147,718.05 and not \$148,021.83 with interest at the rate of 6% per annum on the judgment sum computed from 11th June 2016 until full payment.
32. The 1st and 2nd Defendants in their **Statement of Defence** have **denied paragraph 20** of the Plaintiff's amended statement of claim and say that they are **not liable** to the claim and puts the Plaintiff to strict prove.
33. From the **preceding paragraphs 30,31 and 32**, following are the questions there come to mind and arise from the pleadings-
 - (i) Whether the Plaintiff is entitled obtain judgment against the 1st and 2nd Defendants jointly and severally \$147,718.05;
 - (ii) Whether the Plaintiff entitled to charge interest rate on the said sum calculated from 11th June 2016 until full payment;
 - (iii) Whether the Plaintiff can continue to charge interest to the borrower and is it fair, just and conscionable to do so knowing that the loan account is in default?
34. Certainly, there exists a **dispute** and the **Questions at 33 (iii)** herein above raises a **legal issue** that needs to be determined by this court.
35. I have taken into consideration the following **case authorities** cited by the **Plaintiffs** and the 1st and 2nd Defendants-

- (a) *Fiji Electricity Authority v Balam & Others* [1972] FJLawRp 4; [1972] 18 FLR 20 (3 March 1972) Goudie J said-
- "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.
- (b) *Aerolink Air Services Pty Ltd v Sunflower Aviation Limited* [2017] FJHC 181; HBC013.2011 - the court said at paragraph 4:
- ".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)."
- (c) *Cropper v Smith* (1883), Bowen L.J notes:
- '..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"
- (d) *Suresh Prasad v Rajendra Prasad & S.K Davey Limited* [2001] HBC 318/96; Pathik J noted:
- "An amendment to a Defence is allowed as it is not a case of the Plaintiff being taken by surprise or that the amendment sought is a completely new Defence as alleged. No prejudice caused to the Plaintiff.'
36. In the light of the aforesaid reasons, I find that the amendment sought by 1st and 2nd Defendants are necessary in order to iron out and determine the controversy between the parties the questions that have been raised at paragraph 33 (iii) hereinabove.
37. Further, I find that the proposed amendments sought by the 1st and 2nd Defendants in terms of the Defence of Deception, misleading and unconscionable conduct arise out of the same facts and the Plaintiff's cause of action pleaded by the Plaintiff's herein. Therefore, bearing above in mind, I find that there will be no prejudice caused to the Plaintiff in anyway whatsoever upon grant of the leave to amend the 1st and 2nd Defendants' Statement of Defence.


IN CONCLUSION

- (a) The 1st and 2nd Defendants application seeking leave to amend and file an Amendment Statement of Defence succeeds.
- (b) There will be no orders as to costs made in the discretion of this Court.

FINAL ORDERS

1. The 1st and 2nd Defendants to file/serve their Amended Statement of Defence within 7 days.
2. Any response by the Plaintiff is at liberty to file/serve within 7 days thereafter.
3. The matter is adjourned for assignment of a continuation of a hearing date.
4. Orders accordingly.




VISHWA DATT SHARMA
JUDGE
SUVA
05th Day of July, 2019

cc: Lajendra Lawyers, Suva.
Fa & Company, Suva.