

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

**CIVIL ACTION No. HBC 123/1998**

**BETWEEN**      **TIRATH RAJ SINGH** as the executor and trustee of the estate of SHIRI RAJ SINGH (deceased)

**Plaintiff**

**AND**            **SIROJNI DEVI & SATEN PRASAD** as executors and trustees of the estate of VIR CHAND (also known as VEER CHAND), deceased/

**First Defendant**

**AND**            **LAUTOKA CITY COUNCIL**

**Third Defendant**

**APPEARANCES:**

Mr V Sharma for the Plaintiff

Mr P Gordon for the First Defendants

Ms V Patel for the Second Defendant (excused from hearing)

**DATE OF HEARING:** 17 March 2020

**DATE OF JUDGMENT:** 3rd April 2020

**DECISION**

1. This proceeding, commenced in 1998 arising from events that are said to have taken place in 1997, is one of the oldest unresolved matters in the High Court at Lautoka. The fact that it is still not decided reflects discredit on everyone involved in its conduct, and I don't exclude the Court from that criticism. It is appalling that a relatively straightforward (and modest – only \$24300 plus on-going damage is sought) claim for damages for negligence and nuisance should be still awaiting trial nearly 22 years after the claim was first filed on 23<sup>rd</sup> April 1998, and it is absurd that the court is still being asked at this late stage of the proceedings to add a party, and for leave to file a further amended statement of claim.

**Background to the present application**

2. The proceedings arise out of events on 25 January 1997 when, it is alleged large quantities of water escaped from a sump/soak pit on the property of the original first defendant (Vir Chand) at Savala Street, Lautoka onto the adjoining property or the original plaintiff (Shiri Raj Singh) at 23 Vunivadra Place. This resulted in the plaintiff's retaining wall collapsing and breaking and causing other damage to

furniture, fittings and effects. This damage cost \$24300.00 to repair, and the plaintiff claims against the first defendant in negligence and nuisance, seeking payment of that amount.

3. The plaintiff also claims against the defendant, as owner of the property, for the continuing escape of water from the defendants' property onto the plaintiff's property (while it was owned by the plaintiff) whenever it rained, causing erosion and the build-up of debris, and requiring the plaintiff to clean up afterwards. This ongoing claim is for \$300.00 on each occasion. The statements of claim (the plaintiff now seeks leave to file its Fourth Amended Statement of Claim) do not say how often this has happened.
4. Both the original plaintiff (in December 2017) and first defendant (in 2002) have since passed away, and the on-going conduct of the proceedings has been left to their respective estates, with the estate executors having replaced the original participants. All the parties have also changed their solicitors since the proceedings commenced.
5. The proceedings also include a claim against the second defendant, the Lautoka City Council, which is said to be responsible also for the escape of water and the damage it caused, because – it is said – the Council had (and has) negligently failed to ensure that the underground drainage system it is responsible for is *adequate, effective, proper and in good order, and is not blocked*. The Council did not participate in the matter that is the subject of this ruling.
6. The matter currently before the court is the application by the plaintiff made by Summons on 29<sup>th</sup> January 2020 for the following orders:
  - i. Leave to join as additional (second) defendants Sarojni Devi (already one of the first defendants In her capacity as executor of the original first defendant's estate), and her son Parneel Chandra, who since 2002 have been – as beneficiaries in his estate - the registered proprietors of the Savala Street property originally owned by Vir Chand. The Lautoka City Council would then become the third defendant.
  - ii. Leave to amend the statement of claim by filing a Fourth Amended Statement of Claim adding a claim against the new defendants added under (i) above.
  - iii. Leave to effect service on the new defendants by serving the amended writ at the offices of Messrs Gordon & Company, solicitors. Gordon & Co are currently the solicitors on the record for the first defendants.
  - iv. That the court make directions for filing any Acknowledgement of Service by the added second defendants, and for filing any defence to the amended

statement of claim, and for the further prosecution and completion of the action.

- v. Costs be paid by the first defendants and by Sirojni Devi on a full solicitor/client indemnity basis since the date of the transfer of the Savala Street property to the second defendants on the 23<sup>rd</sup> July 2002.
7. The plaintiff's application of 29 January 2020 is supported by an affidavit by the plaintiff, to which the first defendant has not responded (counsel for the first defendant says that his clients do not contest any of the facts set out in the affidavit, although they do contest the applications).
8. The plaintiff's affidavit provides evidence of how ownership of the defendants' Savala Street property has changed since the proceedings were commenced. A search copy of the title to the property shows that after the death of Vir Chand a transmission was registered on 23 July 2002 into the names of the executors in the estate (the current first defendants), followed immediately – on the same date – by a transfer of the property to Sirojni Devi and Parneel Chandra (the proposed new defendants). Presumably these registrations reflect the will of the original defendant.

#### **Fourth Amended Statement of Claim**

9. Also annexed to the affidavit of the plaintiff is a draft of the proposed Fourth Amended Statement of Claim. Apart from minor consequential changes to the entitling as a result of the addition of new defendants (if that is allowed), the amended claim deals with the change in ownership of the defendants' Savala Street property and adds a new cause of action against the (now) first and second defendants alleging conspiracy and abuse of process by them in effecting the transfer of the property in 2002 *to deceive and injure the Plaintiff's claim and/or continuing claim against the First Defendants and his right of recovery against the First Defendants*.
10. What is said to have prompted this proposed amendment and joinder is the disclosure made at the time of the pre-trial conference of counsel in November 2019 that the Savala Street property is not now owned by the estate, but by the proposed second defendants, as a result of the transfer and transmission referred to in paragraph 7 above. The plaintiff apparently takes the view that this transfer may prevent the court from granting a remedy in his claim against the defendants (other than that against the Lautoka City Council, which is not affected by any change of ownership) for damages for on-going nuisance/negligence.

11. They may be right about this, since the existing pleadings seek a remedy only against the estate, which has not – as we now know - been the owner of the property since 2002. Given that this is so, clearly the existing first defendants executors will not be responsible for the on-going nuisance/negligence that is shown to have occurred since they ceased to own the property. But the transfer should not affect the claim for damage that occurred in 1997, for which – if the claim is upheld – the executors will remain liable as a debt of the deceased who owned the property at the time. If the executors have distributed all the assets of the estate without keeping back the means to meet any judgement on this claim, they will need to satisfy any judgement out of their own pockets.
12. But even if the claim for continuing damages can only be made against the people who owned the property at the time the damage occurred, there is nothing to prevent the plaintiff from instituting new proceedings against the current owners claiming these on-going losses (said to be \$300 each time it rains heavily enough to require a clean-up of the plaintiff's property – see paragraph 11 of the statement of claim, which does not say how often since 1997 these clean-ups have been undertaken).
13. It is also no doubt true that a claim of this sort issued now would likely be met with a limitation defence in so far as it sought to claim damages from more than six years ago, leaving the plaintiff without a remedy for the losses that arose in the period from 2002 until six years prior to the commencement of any new proceedings. If an amendment to the statement of claim in the existing proceedings, and the addition of the proposed second defendants are allowed, the making of these orders may deprive those new parties of a limitation defence that they would have been entitled to raise if separate new proceedings were commenced.
14. Furthermore, the plaintiff issuing any such new proceedings would be entitled to seek consolidation of that claim with the existing claim, on the basis that they relate to the same issues, and that consolidation would avoid duplication and the possibility of different outcomes if the cases were tried separately. Although this is all hypothetical – as counsel for the defendant rightly pointed out when I raised this issue in the course of the hearing - and what considerations might apply in such a scenario cannot be determined by the court on this application for amendment and joinder, nevertheless the possibility that they may arise and cause further delays is something to be considered in deciding the present matter.
15. The legal basis for the proposed new cause of action is by no means clear. Since the actions of the defendants in transmitting and then transferring the property to the estate beneficiaries is perfectly legal, justified and necessary, from the point of view

of the estate and its beneficiaries – who are entitled to distribution of the estate, what is alleged here cannot be an unlawful means conspiracy, because no unlawful means were used to effect the transfer. So for this new claim to succeed it must, if anything, be a ‘lawful means’ conspiracy, the ingredients for which are distilled from the decisions of the House of Lords in **Mogul Steamship Co v McGregor** [1892] AC 25, **Quinn v Leathem** [1901] AC 495 and **Lonrho Ltd v Shell Petroleum Co Ltd (No. 2)** [1982] AC 172. These are set out in **Street on Torts** 14<sup>th</sup> Ed (2015) Oxford University Press at p.396 as follows:

*The tort is often considered to be highly anomalous, despite the fact that it occupies its place within the common law on the repeated authority of the House of Lords. It is said to be (1) the fact of combination in tandem with (2) the intentional infliction of harm in furtherance of (3) an illegitimate purpose that renders the conspirators acts tortious.*

16. I also have some doubt about the assumptions apparently underlying this new cause of action. It seems to be suggested that the existing and proposed new defendants had some obligation either to delay the transfer of the property until the court proceedings are finally resolved, or to inform the plaintiff of the transfer. I don't think either of these proposition is tenable, although even this is complicated by the fact that in all their pleadings until September 2016 (including in a statement of defence filed by the first defendants' current solicitors in February 2015(!) in response to the amended statement of claim filed in 2006 – after the first defendants were substituted for the original defendant) the first defendants had admitted the plaintiff's allegation that:

*The First Defendant is and was at all material times the owner and occupier of land and premises situate at 3 Tivoa Place, Lautoka, legally described as Lot 8 DP 3123 which is on the hill-side immediately above/behind and partly adjoining the Plaintiff's said land and premises.*

(the reference to Tivoa Place is apparently wrong – it should be Savala Street, but the legal description is correct). As we now know, this was no longer true at the time the admission was made. There is therefore at least some justification for the plaintiff's complaint that they were misled (at least until September 2016 when this pleading was changed by the first defendants - in response to the second amended statement of claim - to one that reflects the current reality) about the willingness of the first defendants to accept responsibility for this aspect of the claim, even if strictly speaking they were entitled to contest it.

17. It is not of course the court's role, on an application to amend the statement of claim, to decide whether the proposed new claim can succeed. Order 20, rule 5(1) of the High Court Rules states:

*... 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.*

and the commentary to the Rule sets out the main principles for the application of this rule as follows:

*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 that test is met, leave to amend may be given even at a very late stage of the trial (Elders Pastoral Ltd v. Marr (1987) 2 PRNZ 383 (C.A.)). 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 the expeditious conduct of trials. When leave to amend is granted, the party seeking the amendment must bear the costs of the other party wasted as a result of it.<sup>1</sup>*

## Conclusion

18. In spite of my reservations about the position this will put the proposed added defendant in, I have decided, on balance that it is better to allow the plaintiff to join the current registered proprietors of the defendants' property, to enable the whole dispute to be dealt with at once, rather than require the plaintiff to contemplate fresh proceedings against the current owners, with the issues that might then arise from that. In coming to this conclusion I have taken into account particularly that at least up until 2016 the first defendant executors of the estate of the original owner were apparently happy to accept whatever liability they incurred as a result of accepting that they had continued to own the property. Had they not changed their position on this, the joinder and amendment would not have been necessary. While it is true that this change in pleading occurred nearly four years ago I do not agree with the submission of counsel for the defendants that, given the previous pleading, a bare denial of paragraph 2 of the Second Amended Statement of Claim was sufficient to fully and fairly inform the plaintiff of the nature of the defendant's case.
19. In making this order I do not overlook the gross delays that have occurred in the conduct of this claim. A defendant normally has a right to expect that any claim against it will be pursued conscientiously and without unreasonable delays. That cannot be said to have happened in this case. But in the present case, in spite of the delays, the original parties (i.e. the original owners or their estates) still have a close interest in the two properties affected, and I assume can still provide evidence that will assist the court to reach a determination of liability for events that happened 23 years ago. If that was not the case the defendants had the opportunity to put before

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<sup>1</sup> *Sundar v Prasad* [1998] FJCA 19

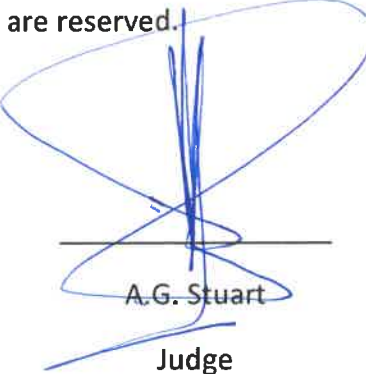
the court in response to the plaintiff's application evidence to show how they have been prejudiced by the delays such that further changes to the claim should not now be permitted. For whatever reason they have chosen not to do so. When I asked counsel for the first defendants about this issue, his response was to refer only to the delay, and he did not point to any particular prejudice that the delay has caused (e.g. the unavailability of witnesses).

20. As a consequence of adding the proposed second defendants as parties, I will also allow the plaintiff to amend his claim to incorporate in the proceedings whatever claim he believes he can sustain against them in their capacity as owners, related to the existing subject matter of the claim. However, I have serious reservations about the tenability of the claims set out in paragraphs 20 – 26 of the draft fourth amended statement of claim annexed to the plaintiff's affidavit, and I urge the plaintiff to consider carefully what any amended statement of claim should allege against the second defendants (the leave to amend does not extend to adding new causes of action against anyone other than the second defendants arising from the fact that they are now the registered proprietors of the property).
21. I would also expect to see in any amended claim precise particulars of and figures for damages claimed (counsel confirmed from the bar that repairs to the retaining wall have been carried out, so there is no reason why the actual costs incurred cannot be claimed), and more particulars about the supposed on-going damages claimed (what work has actually been done on each occasion, and how much has it cost?). Finally on this topic, I note a claim for general damages has been made. If this is a claim for damage to the property, it cannot be a claim for general damages, but if not, what is this for, and who is claiming it?
22. I also make orders giving leave to the plaintiff to serve the second defendants by serving a copy of the amended writ and statement of claim on the offices of Messrs Gordon & Company, solicitors for the first defendants. The acknowledgement of service is to be completed by Gordon & Company. Of course thereafter it will be up to the second defendants who they choose to represent them.
23. I make the following additional directions:
  - i. The plaintiff is to file and serve the amended writ of summons and statement of claim within 21 days of the date of this ruling.
  - ii. The matter is otherwise adjourned for mention to 10.30am on Monday 11 May 2020 to discuss the future conduct of the proceedings.
  - iii. Any further interlocutory applications that any party (including the second defendants) wishes to make are to be filed and served by Monday 4 May

2020 for mention on 11 May. Leave will need to be sought to file any applications after that date.

24. In making these directions I do not expect any further time to be required for discovery or inspection. The obligation to provide discovery is a continuing obligation that the parties have at all times in the lead-up to trial. My expectation is that all the existing parties to the proceeding will have acted in compliance with this obligation and that there will therefore be no need for further discovery as a result of these orders (noting that the claims I expect to be made against the second defendants should be no different in effect from the claims currently made against the first defendants). I expect all counsel at the next mention date to be ready to discuss how any remaining interlocutory applications are to be dealt with, and to set a timetable for them, together with fixing a date for hearing.
25. Both the plaintiff and the first defendant have sought costs on an indemnity basis. I am not satisfied that there is any basis for either application, or perhaps it would better reflect the position to refer to the well understood metaphor involving stones and glass houses. Costs are reserved.



  
A.G. Stuart  
Judge

At Lautoka this 3<sup>rd</sup> day of April 2020

**SOLICITORS:**

AK Lawyers, Nadi for the plaintiff

Gordon & Co, Lautoka for the first defendant

Messrs Vasantika Patel, Nadi for the second defendant