IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No HBC 201 of 2019

BETWEEN

JAMES VICTOR DAVERN & JEANETTE DAVERN of 36 Saltburn Road, Milford, Auckland, New Zealand.

PLAINTIFF

AND

MUSKET COVE RESORT LIMITED a duly incorporated limited liability company pursuant to the Companies Act 2015 and having its registered office at c/- Dick's Place, Malololailai Island, Fiji.

DEFENDANT

Counsel	-	Mr. P. Katia for Plaintiff
		Mr. V. Prasad for Defendant
Date of Hearing	-	31st May 2023
Ruling delivered	-	07th July 2023

RULING

[On Plaintiff's application to amend Statement of Claim & Defendant's application for Strike Out]

[1] There are two applications before me. The Plaintiff has filed a Notice of Motion to seek leave to amend its Statement of Claim pursuant to Order 20 Rule 5 of the **High Court Rules 1988**. Ms. Seini Tinaikoro has deposed an affidavit in support of Plaintiff's application.

[2] Subsequently the Defendant filed Summons pursuant to Order 18 Rule 18 (1) (a) (b) (c) and (d) and Order 23 (1) (a) of the High Court Rules and section 4 (1) (2) of the **Limitation Act 1971** for orders seeking strike out of Plaintiff's proposed cause of action and to provide security for costs as the Defendants reside out of Fiji. Affidavit of Mr. William Moffat has been filed in support of Defendant's Summons.

[3] The Plaintiff's position is that parties have reached consensus in relation to part of the Plaintiff's claim. More particularly registering of the Lease for the Villa and continuation with the Lease and Management Agreement entered between the parties. Also to the release of funds acquired through the Agreement to the Plaintiff. However Plaintiff's states that their claim has not been fully resolved and it involves supporting documents for income and expenditure in relation to the funds and the interest.

[4] The Defendant states that that the purported claims for accounts and interest are irrational and time barred. Therefore the Defendant's application to have it struck out.

[5] In respect of the Plaintiff's application the Court has received following affidavits.

I. Affidavit in Support of the Notice of Motion by Seini Tinaikoro filed on 12th August 2022;
II. Affidavit in Opposition by William Moffat filed on 10th November 2022;
III. Affidavit in Reply by Jeanette Davern filed on 31st January 2023;
IV. Affidavit in Response of William Moffat filed on 04th May 2023.

[6] In relation to the Defendant's application following affidavits have been received.

I. Affidavit in Support of Summons filed on 10th November 2022;
II. Affidavit in Opposition by Jeanette Davern filed on 31st January 2023;
III. Affidavit in Reply by William Moffat filed on 04th May 2023.

[7] At the outset Court notes that there was no directions given for the filing of 2nd Affidavit in Response to the Affidavit in Reply by Jeanette Davern filed on 31st January 2023. Hence I will not consider any contents of the Affidavit of William Moffat filed on 04th May 2023.

[8] The Defendant points out a preliminary objection to the Plaintiff's application. Order 32 Rule 1 states that any application in chambers which has not made ex-parte must be made by summons. The Defendant's view is that the rule provides a mandatory requirement and therefore Plaintiff should not be allowed to maintain an application made by way of a Notice of Motion.

[9] I was assisted by the following reference in **The Supreme Court Practice 1999**. At 32/6/3

Interlocutory applications – normal procedure (rr1-6) both in the Ch D and QBD interlocutory applications are normally made by summons in Chambers. The former practice in the Ch D of making such applications by motion has been much restricted and should only be adopted in very special cases.

[10] The relevant Chancery Division Practice Direction it is quite clear that mode of making an interlocutory application relates to the urgency of the application. The Practice Direction allows an application to be made by way of motion when there is sufficient degree of urgency or such other reasons to justify. Otherwise they should be made by summons.

[11] Mere fact that Plaintiff's application was made by way of a Notice of Motion does not invalidate the whole application. Therefore I now proceed to consider the application.

[12] Order 20 Rule 5 states as follows;

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 or her writ, or any party to amend his or her pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4), or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3)An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues may be allowed under paragraph (2) if the new capacity is one which that party had at the date of the commencement of the proceedings or has since acquired.

(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.

[13] Plaintiff by this amendment proposes to include the following order to the Statement of Claim. 'An order for the reimbursement of any monies still owed to the Plaintiff, including the interest of 5% per annum that was added monthly to the Plaintiff's accounts that was unilaterally ceased by the Defendant without notice or agreement from the Plaintiff'.

[14] The Defendant states that the Plaintiff is now trying to add a completely new claim for the first time. The Defendant adds that there was no claim for interest monies pleaded in the initial pleadings.

[15] Further the Defendant submits that the Plaintiff's proposed claim is statute barred per section 4(1) (a) of the Limitation Act where it states actions founded on simple contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

[16] The Defendant refers to paragraph 12 of Ms. Jeanette Davern's affidavit dated 31st January 2023 to point out that Plaintiff did have a copy of the Statement of Accounts for the years 2011 to 2013. With that Plaintiff should have known that the interest had been ceased in March 2013 and had time till March 2019 to bring an action to claim the interest.

[17] At this point I wish to refer to legal precedents on applications to amend proceedings.

[18] Jenkins L.J in **G.L. Baker Ltd v. Medway Building and Supplies Ltd** [1958] 1 WLR 1216 held "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 defect or error in any proceedings".

[19] Bramwell L.J in **Tildesley v. Harper** [1878] 10 Ch D 393 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 his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise".

[20] Brett M.R in **Clarapede v. Commercial Union Association** [1883] 32 W.R 262 held "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"

[21] The Court of Appeal in **Sundar v Prasad** [1998] ABU 0022 of 1997 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 that test is met, leave to amend may be given even at a very late stage of the trial'.

[22] On the other hand I am guided by following decisions on the question of whether to allow the strike out application before me.

[23] In **Hemant Kumar v Suresh Kumar & Others** [2003] Civil Action No. 33 of 2003 the Court stated "I think it is definitely established the jurisdiction to strike out proceedings under Order 18 should be very sparingly exercised and only in exceptional cases. It should not be exercised where legal questions of importance and difficulty arise."

[24] The Court of Appeal in **National MBF Finance (Fiji) Ltd v Buli** [2000] ABU0057 of 98 held that If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention.

[25] In analysing the two applications it appears to me that the Plaintiff is claiming for the monies owed to them by the Defendant pursuant to a Management Agreement. According to the Plaintiff the monies were earned through a short term letting of the Plaintiff's Villa. The annexure JD-4 in the Affidavit dated 31st January 2023 provides some background to support their claim on interest. Even if the interest was paid at the discretion of the Defendant I am of the view that there needs to be a determination on that

issue by the Court after hearing evidence. In the event if the position favours the Defendant after the hearing there can be an order for cost against the Plaintiff.

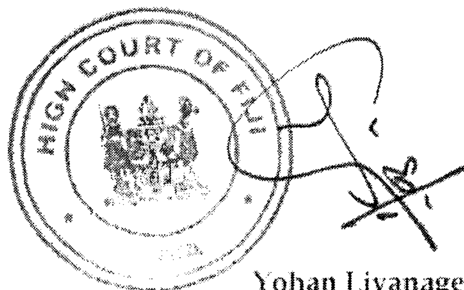
[26] It also appears that the Plaintiff has brought the substantive action within the limitation period. The dispute on the interest arising as a result of the dispute parties faced with the Management Agreement. Therefore I am of the view that the Plaintiff has the liberty to include the claim on the interest in the pleadings.

[27] For the reasons aforementioned I rule in favour of the Plaintiff's application to amend its Statement of Claim.

[28] I wish to thank both learned counsel for their comprehensive submissions made in order to assist Court.

ORDERS

1. Plaintiff allowed to amend the Statement of Claim.
2. Defendant's summons dated 09th November 2022 struck out.
3. Costs shall be in the cause.



Yohan Liyanage

JUDGE

At Suva on 07th July 2023