IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 112 of 2016

BETWEEN: **HARISH CHAND** trading as **ITAUKEI FOOD INDUSTRIES** of Level 1 Unit 1/9 Lot 9 Bila Street, Carreras Road, Votualevu, Nadi.

Plaintiff

AND: **RAJSAMI INVESTMENTS LIMITED** a limited liability company having its registered office at Stage 2, Baadal Place, Makoi, Nasinu, Fiji.

1st Defendant

AND: **RAM SAMI & SONS (FIJI) LIMITED** having its registered office at 37 Badal Place, Makoi, Nakasi.

2nd Defendant

AND: **RAJENDRA SAMI** of 8 Miles, Makoi, Nasinu, Director.

3rd Defendant

Before : Master U.L. Mohamed Azhar

Counsels: Mr. I. Fa for the Plaintiff
Ms. S. Devon for the defendants

Date of Ruling: 09th February 2024

RULING

01. This court dismissed the summons filed by the defendants seeking to strike out the plaintiff's action under Order 18 rule 18 of the High Court Rules. Thereafter, the plaintiff who was directed to file the Reply to Statement of Defence filed a summons, pursuant to Order 20 rule 5 of the High Court Rule, seeking leave amend the Statement of Claim for the second time. The defendants objected to the summons for amendment and opted to file the affidavit in opposition. However, without filling the affidavit in opposition, the defendants filed the summons pursuant to Order 23 rule 1 (a) and of the High Court

Rules seeking an order on the plaintiff to deposit a sum of $ 55,000.00 as the security for costs within 14 days of such order by the court.

02. The court directed both the plaintiff and the defendants to file their respective affidavits in opposition and affidavits in reply to take up both applications for hearing together. The parties complied with the directions and also tried to settle both applications; however, their attempts proved abortive and the matter was finally fixed for ruling on both applications.

03. The Order 20 rule 5 of the High Court Rules provides for the court's power to grant leave to amend the pleadings. The defendant company filed its instant summons under this rule. The rule provides:

> *"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."*

04. The above rule in its plain meaning gives a broad discretion to the court to allow amendment of pleading at any stage of proceedings, and such discretion should be exercised in accordance with the well-settled principles. **Lord Keith of Kinkel** delivering the opinions of the House of Lords in **Ketteman and others v Hansel Properties Ltd** [1988] 1 All ER 38, held at page 48 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".

05. There is a number of authorities which set out the principles that can guide the court when exercising the discretion provided by the rules. The following principles, of course not exhaustive, emerge from the authorities:

a. The discretion should not be exercised to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence (**Ketteman and others v Hansel Properties Ltd** (supra)).

b. There is a difference between allowing amendment to clarify the real issues in dispute and those that permit a distinct defence to be raised for the first time (**Ketteman and others v Hansel Properties Ltd** (supra)).

c. All such amendments ought to be made as may be necessary for the purpose of determining the real questions in controversy between the parties (**R. L. Baker Ltd v Medway Building & Supplies Ltd** [1958] 3 All E.R. 540.).

d. Amendment of genuine mistake and negligent or careless omission, without any fraudulent intention, should be allowed if it can be done without injustice to the other party (**Cropper v. Smith** (1883)26 Ch. D. 700; **Clarapede v. Commercial UnionAssociation** (1883) 32 WR 262). There is no injustice if the other side can be compensated by costs (**Clarapede v. Commercial UnionAssociation** (supra). However, the justice cannot always be measured in terms of money and cost (**Ketteman and others v Hansel Properties Ltd** (supra)).

e. Amendment to include the new defences created by a new statute could be allowed (**Application des Gaz SA v Falks Veritas Ltd** [1974] 3 All ER 51).

f. Amendment to include the materials obtained on discovery will be permitted. However, if it is for the purpose ulterior to the pursuit of the action, it should not be allowed (**Omar v Omar** [1995] 1 W.L.R. 1428; **Mialano Assicuraniona Spa v Walbrook Insurance Co Ltd** [1994] 1 W.L.R 977).

g. The ultimate purpose is to do justice between the parties (**Ketteman and others v Hansel Properties Ltd** (supra); **Reddy Construction Company Ltd v Pacific Gas Company Ltd** [1980] 26 FLR 121 (27 June 1980)).

06. The Fiji Court of Appeal in **Reddy Construction Company Ltd v Pacific Gas Company Ltd** *(supra)*, succinctly summarized the test applicable and held that:

> *"The primary rule is that leave may be granted at any time to amend on terms if it can be done without injustice to the other side. The general practice to be gleaned from reported cases is to allow an amendment so that the real issue may be tried, no matter that the initial steps may have failed to delineate matters. Litigation should not only be conclusive once commenced, but it should deal with the whole contest between the parties, even if it takes some time and some amendment for the crux of the matter to be distilled. The proviso, however, that amendments will not be allowed which will work an injustice is also always looked at with care. So in many reported cases we see refusal to amend at a late stage particularly where a defence has been developed and it would be unfair to allow a ground to be changed".*

07. Again in **Sundar v Prasad** [1998] FJCA 19; Abu0022u.97s (15 May 1998) the Fiji Court of Appeal further emphasized the test and stated how the balance to be made between the interest of the party seeking the amendment and the other side which incurs the cost. The Court unanimously held that:

> *Generally, it is in the best interest of the administration of justice that the pleadings in an action should state fully and accurately the factual basis of each party's case. For that reason amendment of pleadings which will have that effect are usually allowed, unless the other party will be seriously prejudiced thereby (G.L. Baker Ltd. v. Medway Building and Supplies Ltd [1958] 1 WLR 1231 (C.A.)). 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.*

08. The plaintiff entered into a lease agreement with Bula Island Food Supplies Limited over the property known as Lot 9 on DP No. 10093 in Certificate of Title No. 40402 situated at Bila Street, Carreras Road, Votualevu, Nadi (hereinafter referred to and called as **the demised premises**) for the period of one year from 24.07.2015 on monthly rental of $ 2,500.00. The agreement had an automatic renewal clause for a maximum period of three years if required by the plaintiff. The plaintiff operated a business of processing agricultural produce from Fiji to export to Australian market. The plaintiff also lodged a Caveat on the Title of the demised premises on 19.10.2015 pursuant to the arrangements made with his lessor - Bula Island Food Supplies Limited. The plaintiff arranged a meeting on the demised premises with his suppliers on 24.04.2016 as part of his business. On the same day the defendants wrongfully and without just cause trespassed and broke into the demises premises. The defendants locked out the plaintiff's staff and his security guards and placed their (defendants') security guards to prevent re-entry by the plaintiff and his staff.

09. Owing to the alleged trespass by the defendants, the plaintiff suffered loss and sued the defendants for damages which had been particularized as (a) loss of business, (b) loss of contract with suppliers and buyers overseas and local (c) tarnish of reputation and (d) long term business suffering. Therefore, the plaintiff claimed special damages in sum of $ 217,000.00 with interest at the rate of 6% and general damages together with cost on solicitor/client indemnity basis. The plaintiff thereafter filed the amended writ and sought

injunctions against the defendants preventing them from interfering with his possession. The injunction application was heard by a judge and the plaintiff was granted ex-parte injunctions against the defendants. However, the injunctions were dissolved later by the judge. In the meantime, the plaintiff further amended his writ two times and filed the amended writs on 29.06.2016 and on 02.08.2016 respectively, without leave of the court. The previous Master by a written ruling disallowed the amended writ filed on 02.08.2016 without the leave of the court.

10. In the proposed amendments, the plaintiff firstly provides more particulars to all three causes of action. Secondly, provides the specific particulars of damages caused to him due to the loss of business, stolen items and long term business suffering. The damages have been categorized and specified unlike the damages that were precisely pleaded in the statement claim which was previously filed by the plaintiff.

11. The defendants' main concern is the the delay and the prejudice to them that may be caused due to the proposed amendment. Litigation should not only be conclusive once commenced, but it should deal with the whole contest between the parties, even if it takes some time and some amendment for the crux of the matter to be distilled [**Reddy Construction Company Ltd v Pacific Gas Company Ltd** (supra)]. The proposed amendments do not deviate from the original causes of action pleaded by the plaintiff. The causes of action remain same, but proposed amendments try to specify and categorize damages in details. It cannot be said that, these amendment will prejudice the defendants, because the plaintiff owes the duty to prove the damages specified and categorized in proposed statement of claim. The defendants could possibly be compensated by costs for the delay. Accordingly, I decide to allow amendments proposed by the plaintiff with reasonable costs in favour of the defendants.

12. The second application is by the defendants for an order on the plaintiff to deposit $ 55,000.00 as the security for costs within 14 days of such order by the court.

13. The Order 23 of the High Court Rules gives discretion to the court to order for security for cost and deals with the other connected matters. Whilst the rule 1 deals with the discretion of the court, the other rules 2 and 3 deal with the manner in which the court may order security for cost and additional power of the court. The rule 1 reads as follows:

Security for costs of action, etc (O.23, r.1)

1.-(1) Where, on the application of a defendant to an action or other proceedings in the High Court, it appears to the Court –

(a) that the plaintiff is ordinarily resident out of the jurisdiction, or

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a normal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or

(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,

Then, if having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.

(2) The court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.

(3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.

14. Unambiguous wording of the above rule clearly indicates that, it is a real discretion given to the court whether to order security or not. This discretion has to be exercised considering all the circumstances of the case. Sir Nicolas Browne Wilkinson V.C in **Porzelack K G v. Porzelack (UK) Ltd**, (1987) 1 All ER 1074 at page 1077 as follows:

> "Under Order 23, r1(1) (a) it seems to me that I have an entirely general discretion either to award or refuse security, having regard to all the circumstances of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident plaintiff. The question is what, in all the circumstances of the case, is the just answer".

15. It is no longer an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. The following principles emerge from the several authorities in this regard. However, given the discretionary power expected to be exercised by courts with judicial mind considering all the circumstances of a particular case, these principles should not be considered to be exhaustive;

a. Granting security for cost is a real discretion and the court should have regard to all the circumstances of the case and grant security only if it thinks it just to do so (**Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd** [1973] 2 All ER 273; **Porzelack K G v. Porzelack (UK) Ltd** (1987) 1 All ER 1074.

b. It is no longer an inflexible or a rigid rule that plaintiff resident abroad should provide security for costs (**The Supreme Court Practice 1999**).

c. Application for security may be made at any stage (**Re Smith** (1896) 75 L.T. 46, CA; and see **Arkwright v. Newbold** [1880] W.N. 59; **Martano v Mann** (1880) 14 Ch.D. 419, CA; **Lydney, etc. Iron Ore CO. v. Bird** (1883) 23 Ch.D. 358); **Brown v. Haig** [1905] 2 Ch. 379. Preferably, the application for security should be made promptly (**Ravi Nominees Pty Ltd v Phillips Fox** ((1992) 10 ACLC 1314 at page 1315).

d. The delay in making application may be relevant to the exercise of discretion; however, it is not the decisive factor. The prejudice that may be caused to the plaintiff due to delay will influence the court in exercising its discretion (**Jenred Properties Ltd v. Ente Nazionale Italiano per il Tuismo** (1985) Financial Times, October 29, CA; **Ross Ambrose Group Pty Ltd v Renkon Pty Ltd** [2007] TASSC 75; **Litmus Australia Pty Ltd (in liq) v Paul Brian Canty and Ors** [2007] NSWSC 670 (8 June 2007).

e. The purpose of granting security for cost is to protect the defendant and not to put the plaintiff in difficult. It should not be used oppressively so as to try and stifle a genuine claim (**Corfu Navigation Co. V. Mobil Shipping Co. Ltd** [1991] 2 Lloyd's Rep. 52; **Porzelack K G v. Porzelack (UK) Ltd** (1987) 1 All ER 1074. Denial of the right to access to justice too, should be considered (**Olakunle Olatawura v Abiloye** [2002] 4 All ER 903 (CA)).

f. It may be a denial of justice to order a plaintiff to give security for the costs of a defendant who has no defence to the claim (**Hogan v. Hogan** (No 2) [1924] 2 Ir. R 14). Likewise, order for security is not made against the foreign plaintiffs who have properties within the jurisdiction (**Redondo v. Chaytor** (1879) 40 L.T. 797; **Ebbrard v. Gassier** (1884) 28 Ch.D. 232).

g. The court may refuse the security for cost on *inter alia* the following ground (see: **The Supreme Court Practice 1999** Vol 1 page 430, and paragraph 23/3/3;

    1. If the defendant admits the liability.
    2. If the claim of the plaintiff is bona fide and not sham.
    3. If the plaintiffs demonstrates a very high probability of success. If there is a strong prima facie presumption that the defendant will fail in his defence.
    4. If the defendant has no defence.

h. The prospect of success, admission by the defendants, payment to the court, open offer must be taken into account when exercising the discretion. However, the attempt to reach settlement and "without prejudice" negotiations should not be considered

(**Sir Lindsay Parkinson & Co. Ltd v. Triplan Ltd** (supra); **Simaan Contracting Co. v. Pilkingoton Glass Ltd** [1987] 1 W.L.R. 516; [1987] 1 All E.R. 345).

i. In case of a minor the security for cost will be awarded against the parent only in most exceptional cases (**Re B. (Infants)** [1965] 2 All E.R. 651).

16. The plaintiff holds dual citizenship. He lives in Fiji and Australia. He has business interest in Fiji. The claim is for damages caused due to alleged trespass into the demised premises. The court by its recent ruling decided that, there is a reasonable cause action for the plaintiff in this case against the defendants. This means there is some chance of success, when only the allegations in the statement of claim in this case are considered. The plaintiffs' claim seems to be bona fide and not sham.

17. The application of for security for cost can be made at any time. The delay in making such an application is not a decisive factor. However, the delay can be considered in exercising the discretion. This matter commenced in year 2016. There were numerous interlocutory applications and one of them was the defendants' application for striking out of the plaintiff's action, which was unsuccessful. The defendant brought the current application after their application for striking out was dismissed by the court. This gives an indication that, the defendants try to stifle the plaintiff's action by filing this belated summons for security for costs after they failed in their application for the striking out. I also note the fact that, it is no longer an inflexible or a rigid rule that plaintiff resident abroad should provide security for costs. For these reasons I decide not to exercise my discretion in favour of the defendants in this matter.

18. Accordingly, I make the following orders in respect of both summons:

a. The leave is granted for the plaintiff to amend the statement of claim.
b. The plaintiff should pay a summarily assessed costs in sum of $ 2,000.00 the defendants within 14 days.
c. The summons filed by the defendants seeking security for costs is dismissed, and
d. The defendants should pay a summarily assessed costs in sum of $ 1,000.00 to the plaintiff within 14 days.

HIGH COURT OF FIJI
LAUTOKA

U.L Mohamed Azhar
Master of the High Court

At Lautoka
09.02.2024