

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 326 of 2020

BETWEEN : SAMBHU LAL CONSTRUCTION (FIJI) LIMITED
Plaintiff

AND : MODERN ALUMINIUM & GLASS (FIJI) PTE LTD
Defendant

(BY ORIGINAL ACTION)

And

BETWEEN : MODERN ALUMINIUM & GLASS (FIJI) PTE LTD
Plaintiff

AND : SAMBHU LAL CONSTRUCTION (FIJI) LTD
First Defendant

AND : FIJI NATIONAL UNIVERSITY
Second Defendant

(BY COUNTER CLAIM)

Counsel : Mr. S. Singh for Counter Claim Plaintiff
Mr. A.K. Singh for Counter Claim First Defendant
Mr. R. Prasad for Counter Claim Second Defendant.

Hearing : 28 January 2025
Judgment : 28 April 2025

JUDGMENT

(on application for leave to appeal from a decision of the Master)

- [1] Modern Aluminium & Glass (Fiji) Pte Ltd (**‘Modern Aluminium’**) seeks leave to appeal from a ruling of the learned Master dated 19 September 2024, striking out its counterclaim against Fiji National University (**‘FNU’**). Modern Aluminium argues that the counter claim against FNU ought to be reinstated.
- [2] Both FNU and Sambhu Lal Construction (Fiji) Ltd (**‘Sambhu Lal’**) resist the appeal arguing that the Master was correct.

Background

- [3] Sambhu Lal is the main contractor for a construction project undertaken for FNU. Modern Aluminium subcontracted to Sambhu Lal to undertake part of the work. The contract between Modern Aluminium and Sambhu Lal appears to have been signed in November 2018. Modern Aluminium contracted to undertake certain work while Sambhu Lal contracted to pay for this work. A Project Manager was employed by FNU to oversee the project.
- [4] On 7 January 2020, Mr Manoratnam Narayan, Manager Projects for FNU, wrote to Modern Aluminium. The letter reads, in part:

*Upon request by the main contractor, the University hereby provides this letter of recommendation for your engagement as a sub-contractor to the main contractor Sambhu Lal Construction Limited and assures that companies interest to the project is protected under the main contract **clause 38** of AS4000 General Conditions of Contract.*

Subject to the above the University will honour the contract and ensure conformance to the contract guidelines and timelines if and upon default of the main contractor.

- [5] It appears that on about 16 January 2020 Modern Aluminium commenced work on the construction project. Sambhu Lal pleads in its original Statement of Claim that it made an advance part payment to Modern Aluminium but upon subsequent discovery of defects in Modern Aluminium's work sought rectification of the defects. The defects were allegedly not rectified and, accordingly, the present proceeding was brought by Sambhu Lal in October 2020 seeking specific performance by Modern Aluminium in accordance with their contract.
- [6] Modern Aluminium filed a statement of defence and counterclaim on 6 November, 2020. In its counterclaim against Sambhu Lal it sought payment of \$122,429.92 for the work already undertaken.
- [7] Sambhu Lal filed a reply and defence to the counterclaim on 3 December 2020. On 6 June 2022, Sambhu Lal filed an amended statement of claim. There followed, on 21 June 2022, the filing by Modern Aluminium of an amended statement of defence and counterclaim – the amended counter claim is the subject of the present application for leave to appeal. Of particular interest, in respect to the amendments, was the joining of FNU as a second Defendant to the counterclaim. Modern Aluminium pleaded that FNU, by its letter of 7 January 2020, guaranteed payment to Modern Aluminium in the event that Sambhu Lal defaulted on payment.
- [8] FNU filed a defence to the counterclaim on 6 July 2022. On 19 July and 27 July, a summons was filed by Sambhu Lal and FNU, respectively, to strike out the counter claim – each application being made under Order 18, rule 18 of the High Court Rules 1988.
- [9] The applications were heard before the Master and a ruling issued on 19 September 2024. The learned Master noted that the defendants had raised procedural irregularities with Modern Aluminium's amended counter claim. They argued that Modern Aluminium was required to obtain leave to file the amended counterclaim but had failed to do so. Further, Modern Aluminium had failed to file a Notice in Form 8 as required under Order 15, rule 3(5). The learned Master rejected the procedural arguments. The learned Master turned to the substantive issue, being whether there was a reasonable cause of action identified in the counter claim against FNU. The Master noted that FNU had already paid the monies to its main contractor, Sambhu Lal, for the works undertaken by Modern Aluminium. The Master determined at 41:

I find FNU on its part has fulfilled its obligations as it has paid Sambhu Lal for work done under the sub contract as stated by Modern Aluminium in para 29 of the amended counterclaim. There is no cause of action against FNU and the claim against FNU is indeed frivolous, scandalous and abuse of court process.

- [10] Modern Aluminium filed a summons for leave to appeal on 3 October 2024. FNU and Sambhu Lal each filed an affidavit in opposition on 7 November 2024. A reply was filed for Modern Aluminium on 15 November 2024.

Decision

- [11] In *Devi v Shah* [2024] FJHC 316, Mackie J set out the test for the grant of leave to appeal as follows:

10. In Prasad v Republic of Fiji & Attorney General (No 3) [2000] FJHC 265; [2000] 2FLR 81 Justice Gates (as his Lordship then was) dealing with an application for leave to appeal to set aside interlocutory order stated:

*“In an application for leave to appeal **the order to be appealed from must be seen to be clearly wrong or at least attended with sufficient doubt and causing some substantial injustice before leave will be granted** see Rogerson v. Law Society of the Northern Territory [1993] NTCA 124; [1993] 88 NTR 1 at 5-33; Niemann v. Electronic Industries Ltd. [1978] VR 451; Nationwide News Pty. Ltd. (t/a Centralian Advocate) v. Bradshaw (1986) 41 NTR 1.*

*Fiji's legislative policy against appeals from interlocutory orders appears to be similar inter alia to that of the State of Victoria, Perry v Smith [1901] ArgusLawRp 51; (1901) 27 VLR 66 at 68; and also with appeals to the High Court of Australia, see Ex parte Bucknell [1936] HCA 67; [1976] 56 CLR 221 at 223. If it is necessary for instance to expose **a patent mistake of law in the judgment or to show that the result of the decision is so unreasonable or unjust as to demonstrate error, then leave will be given** Niemann (supra) at 432. It is not sufficient for an appeal court to gauge, that when faced with the same material or situation it would have decided the matter different.*

The court must be satisfied that the decision is clearly wrong (Niemann at 436).

Leave could be given for an exceptional circumstance such as if the order has the effect of determining the rights of the parties Bucknell (supra) at 225; *Dunstan v Simmie & Co. Pty Ltd* [1978] VicRp 62; [1978] VR 669 at 670. This is not the case here. Leave could also be given if “**substantial injustice would result from allowing the order**, which it is sought to impugn to stand,” *Dunstan* (supra) at 670; *Darrellea (Vic.) Pty Ltd v Union Assurance Society of Austria Ltd* [1969] VicRp 50; [1969] VR 401 at 408.”

11. *I am also guided by the decision in Ali v. Radruita [2011] FJHC 302 (26 May 2011). This was an application for leave to appeal an order made by the Master that the defendant should pay \$10,000.00 as interim damages to the plaintiff within 28 days. Calanchini J (as His Lordship then was) said that “It is well settled that only in exceptional circumstances will leave be granted to appeal an interlocutory order. Leave will not normally be granted unless some injustice would be caused (page 4). Then at page 6 he said:*

“The exceptional circumstances that the Defendant is required to establish in the present application are that the Master has acted upon a wrong principle, or has neglected to take into account something relevant, or has taken into account something irrelevant or that the amount awarded is so much out of all reasonable proportion to the facts proved in evidence. In my judgment the Defendant must also establish that it is necessary in the interests of justice for the Master’s award to be reviewed”.¹

- [12] Has Modern Aluminium shown the learned Master’s decision to be ‘clearly wrong or at least attended with sufficient doubt and causing some substantial injustice’? Leave may be granted if the applicant shows² that the decision is so unreasonable or unjust so as to demonstrate error, or ‘acted upon a wrong principle, or has neglected to take into account something relevant, or has taken⁴ into account something irrelevant’.

¹ My emphasis.

- [13] FNU sought to strike out Modern Aluminium's counter claim under Order 18, r 18 on the basis that the counter claim disclosed no reasonable cause of action against FNU, was frivolous and scandalous and an abuse of the court process. The test that the Master ought to have applied when deciding the matter was:

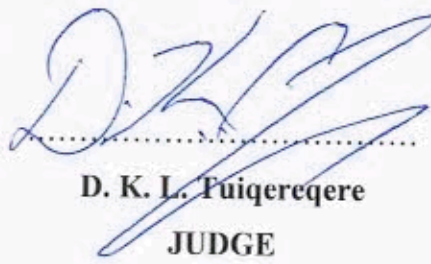
The Court's power to strike out a claim must be sparingly used and only in clear and obvious cases. A party ought not to be denied access to the courts unless the cause of action is so untenable that they cannot succeed. Even where a case appears weak, such that it is unlikely to succeed, this does not suffice to warrant striking out. It is, however, an abuse of the process of the court for a party to bring a case otherwise than in good faith or for proper purposes. A claim may be struck out for disclosing no reasonable cause of action. The facts must be taken as pleaded in the Statement of Claim unless admissions to the contrary by a plaintiff is deposed. An interlocutory application is not the time to resolve factual disputes.²

- [14] Modern Aluminium pleaded in its amended defence and counter claim that FNU's letter of 7 January 2020 was a guarantee or indemnity that FNU would pay for works completed by Modern Aluminium in the event Sambhu Lal defaulted on such payment. Modern Aluminium pleaded that it made several demands to FNU for payment of the outstanding amount of \$122,429.92 but that FNU did not conform to its guarantee and, as such, is liable to Modern Aluminium for the amount that Sambhu Lal is in default.
- [15] FNU denies that the letter of 7 January 2020 is a guarantee. It says the letter is a recommendation only. Sambhu Lal says that there is no privity of contract between FNU and Modern Aluminium. The contract with Modern Aluminium is with Sambhu Lal. Only Sambhu Lal has a contract with FNU.
- [16] Both defendants appear to argue that the learned Master found that there was no privity of contract between Modern Aluminium and FNU. I do not agree. It is plain from a reading of paragraphs 39 to 41 of the decision that the learned Master struck out the counter claim on the basis that FNU had made payment of the disputed monies to Sambhu Lal and had thus fulfilled its obligations under clause 38 of the main contract between Sambhu Lal and FNU.

² *Hu v Ding* [2024] FJHC 531 (9 August 2024) at 20.

- [17] That said, in my view, the learned Master has erred in two respects in striking out the counter claim against FNU. Firstly, the Master has not applied the correct test to strike out the counter claim. There is no discussion in the decision of the test or the fact that the bar is high. For the reasons provided below, I am satisfied that this is not a clear and obvious case to strike out Modern Aluminium's counter claim. Secondly, in my view the learned Master was not in any position to make a finding on whether FNU had discharged its obligations. The learned Master made a finding based solely on a reading of clause 38.3 of the main contract. However, the wording of the provision and its application to the facts in the present case is far from straightforward. It would be helpful to consider the clause in the context of the rest of the main contract rather than in isolation. Moreover, even if FNU can be said to have fulfilled its obligations under the main contract to Sambhu Lal there is still the need to consider the relevance of the letter of 7 January 2020. If the pleading in the amended counter claim from Modern Aluminium is correct, then this letter was a guarantee by FNU to pay Modern Aluminium in the event that Sambhu Lal failed to do so – in such circumstances it would be irrelevant that FNU complied with its obligations in the main contract.
- [18] I turn to the arguments by the defendants as to why the counter claim should be struck out. Sambhu Lal argues that there is no privity of contract between Modern Aluminium and FNU as the subcontract is between Sambhu Lal and Modern Aluminium only. That may be correct but again this ignores the letter of 7 January 2020. FNU says that the said letter is not a guarantee. This factual dispute should be left to the trial judge for determination upon a hearing of the evidence as to how the letter came to be and its purpose – which will no doubt inform the trial judge as to what to make of the letter. It is trite that disputed facts should not be determined at this juncture of the proceedings.
- [19] I am, therefore, satisfied that leave ought to be granted to Modern Aluminium to appeal from the learned Master's decision. I make the following orders:
- i. Leave is granted to Modern Aluminium & Glass (Fiji) Pte Ltd to appeal from the learned Master's decision of 19 September 2024.
 - ii. Costs to be in the cause.




D. K. L. Fuiqereqere
JUDGE

Solicitors:

Shelvin Singh Lawyers for the Counter Claim Plaintiff

AK Singh Law for the Counter Claim First Defendant

Legal In-House for Counter Claim Second Defendant

