

IN THE FIJI COURT OF APPEAL
(AT SUVA)

CIVIL JURISDICTION

CIVIL APPEAL NO. 9 OF 1990
(High Court Action No. 583 of 1988)

BETWEEN:

THE ATTORNEY GENERAL

APPELLANT

-and-

CONSOLIDATED REALTORS LTD

RESPONDENT

Mr. A. Cope for the Appellant
Mr. S. J. Stanton and Mr. V. Parmanandam for the Respondent

Date of Hearing : 12th November, 1992
Date of Delivery of Judgment : 15th JANUARY, 1993

INTERIM DECISION ON
RESPONDENT'S NOTICE OF MOTION

This matter first came before this Court on 18th June 1992 by way of an appeal from a decision of Mr. Justice Byrne, itself given on 5th December 1989. Consolidated Realtors Ltd as plaintiff, had sued the Attorney General for damages, the Writ having been issued on 30th August 1988. His Lordship found for the plaintiff assessed damages, and judgment was entered accordingly. The Attorney General appealed.

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Because the statement of claim, the facts admitted or found by the learned Judge and contained in the record before us, together with his findings based on them, seemed to this Court to indicate that the plaintiff respondent had established no cause of action at all, we called upon its counsel first to explain to us how a case had been established at first instance, and, if it had not, why an appeal should not succeed. We might add that the grounds of appeal filed by the Attorney General did not even mention a failure by the plaintiff to establish a cause of action, nor did the original statement of defence, and no application to strike out the statement of claim as disclosing no cause of action had been made. However, we did not feel disposed to hear an appeal from a finding which appeared to us to have been based upon facts arising after the issue of the Writ.

After proceeding for sometime, counsel for the respondent plaintiff sought and was granted an adjournment until August 1992. Two days before the appeal was due to resume, the respondent filed a notice of motion in this Court seeking leave to file an amended statement of claim. That statement of claim sought to raise new matter, and the Attorney General applied for and was granted an adjournment. The notice of motion was stood over for hearing on 12th November 1992, and the appeal was stood over to a date to be fixed.

We do not think it is necessary to recount the facts at this stage. It is sufficient for us to say that the amended statement of claim seeks to do at least two things. One is to allow the plaintiff to rely on facts that occurred after the issue of the Writ as giving rise to a cause of action against the defendant; in effect it seeks to move the date of issue of the Writ forward so as to enable it to rely on events that occurred four months, and perhaps as long as 13 months after the original date of issue in order to attempt to establish the plaintiff's claim. The other is that it seeks to rely on facts which, we are told, are not admitted and which will seriously prejudice the defendant unless it has the chance to have them adjudicated upon by a Judge at first instance.

In those circumstances we would not consider granting leave to file the amended statement of claim unless the matter were to go back to a Judge to receive evidence upon and hear submissions about what is in effect a new cause of action.

However, the matter does not simply involve sending the matter back to the trial Judge who originally heard the proceedings. It may be that on the hearing of the present appeal this Court would not be disposed to agree with the inferences to be drawn from or the weight to be given to facts which the trial Judge drew or gave. It may be that the views which he formed based upon them, might colour his approach to the new evidence and inferences to be drawn from it. In a nutshell it might be

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said that the plaintiff seeks to hold on to what it has, and then flesh its proceedings out so as to give it a cause of action where it may be that none existed previously.

If the appeal fails and the plaintiff retains his verdict, then it will be unnecessary for the plaintiff to amend at all. There does not appear to be any cross appeal by it on the basis of inadequacy of damages. Even if there were, then no amendment would be required as to the cause of action. On the other hand if the appeal succeeds, there may be very good reasons why the matter should not proceed before the same Judge but should recommence before another. Indeed, if the original statement of claim in fact disclosed no cause of action, then the whole thing should be put into proper shape by a fresh Writ and statement of claim. No question of the applicability of the Statute of Limitations arises at this stage; even if it did, then it would be a good reason for denying the amendments.

In all the circumstances we consider that the proper course to take is to continue the appeal. When we have reached a conclusion as to how that should be decided we can then make an appropriate order on the notice of motion.

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The motion will be stood over to await the outcome of the appeal.

Michael M. Helsham

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Mr. Justice Michael M. Helsham
President, Fiji Court of Appeal

Moti Tikaram

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Sir Moti Tikaram
Resident Judge of Appeal

Arnold Amet

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Mr. Justice Arnold Amet
Judge of Appeal