

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 543 OF 2004

BETWEEN : **NBF ASSET MANAGEMENT BANK** a body corporate
duly incorporated under the National Bank of Fiji
Restructuring Act, 1996 and having its registered
office at Tower 3, Reserve Bank of Fiji, Suva.

Plaintiff

AND : **TAVUENI ESTATES LIMITED** a limited liability
company incorporated under the laws of Fiji with its
registered office at Suva in Fiji.

First Defendant

: **THE REGISTRAR OF TITLES** at the Registrar of
Titles Office, 1st Floor, Suvavou House, Suva, Fiji.

Second Defendant

: **THE ATTORNEY GENERAL OF FIJI**

Third Defendant

BEFORE : Hon. Justice Kamal Kumar

COUNSEL : Mr J. Oswald-Jacobs for the Plaintiff
Mr P. Knight for the First Defendant

DATE OF RULING : 17 February 2014

RULING

(Application to Amend Fourth Amended Statement of Claim)

1.0 Introduction

1.1 On 31st August 2011 Plaintiff filed Application by way Summons for Leave to amend its Fourth Amended Statement of Claim.

1.2 Even though a subsequent Application filed by the Plaintiff to strike out Second and Third Defendants Defence filed on 2nd September 2011 as amended by Summons filed on 28 September 2011 was dealt with by His Lordship Justice Amaratunga in his Ruling delivered on 11 April 2013 as Master of High Court the Application to Amend Fourth Amended Statement of Claim and Application by First Defendant to strike out Defence to Counterclaim seem to have been overlooked.

1.3 This matter was referred to me on 28 June 2013 and on perusal of the Court file it was revealed that following Applications were pending before the Court:-

- i. Application by Summons filed on 6 May 2011 by First Defendant to Strike Out Defence to Counterclaim;
- ii. Application by Summons filed on 31st August 2011 by Plaintiff to amend its Fourth Amended Statement of Claim;
- iii. Application by Summons dated 28 May 2013 by Plaintiff to file Amended Defence to First Defendant's Counter-Claim.

1.4 On 16 July 2013 this matter was listed to be called before me for the first time when following Orders were made by consent of Counsel for the Plaintiff and the First Defendant:-

"1. Leave is granted to the First Defendant to withdraw Summons dated 4 May 2011 and filed on 6 May 2011 and as such Summons is dismissed and struck out.

2. The Plaintiff have leave to file and serve an amended Reply and Defence to the First Defendant's Amended Defence to Fourth Amended Statement of Claim and Amended Counterclaim dated 8 December 2010 as proposed and annexed as Annexure marked "TS-7" to the Affidavit of Trevor William Seeto sworn on 30 April 2013.

3. The Plaintiff is to file and serve the Amended Defence to Counterclaim within seven days from date hereof.

Application by the Plaintiff to amend Fourth Amended Statement of Claim:

a) Plaintiff (Applicant) to file and serve submissions by 31 July 2013;

b) First Defendant (Respondent) to file and serve submissions by 15 August 2013;

c) Plaintiff/Applicant to file and serve reply to First Defendant/Respondent's submissions by 23 August 2013;

d) Ruling to be delivered on Notice.

4. No orders as to costs.”

1.5 Hence, the only Application that needs to be dealt with is the Application to Amend Plaintiff's Fourth Amended Statement of Claim in paragraph 1.3 (ii) hereof.

1.6 Following Affidavits were filed by the Parties:-

For Plaintiff/Applicant

Affidavit of Trevor William Seeto sworn on 30 April 2013;

For First Defendant/Respondent

Affidavit in Reply of Seini Tinaikoro sworn on 8 May 2013.

1.7 Plaintiff and First Defendant also filed their submissions as directed by Court.

2.0 Background Facts

2.1 On or about 2nd June 1995 Plaintiff's predecessor and the First Defendant entered into a Deed of Conveyance ("**Deed**") whereby First Defendant agreed to transfer certain lots to Plaintiff forming part of Certificate Title Nos. 13577 and 17922.

2.2 Both Certificate of Titles No. 13577 and 17922 were encumbered to National Bank of Fiji.

2.3 Pursuant to the Deed, First Defendant was to convey the lots to National Bank of Fiji which the First Defendant could not dispose off by way of Sale by 12 June 1995.

2.4 Pursuant to Deed the First Defendant attempted to transfer Lot 1 on Deposit Plan No. 7340 and Lot 1 on Deposited Plan No. 7341 (collectively referred to as **“Water lots”**) to the Plaintiff.

2.5 It is alleged that the Certificate of Titles in respect to Water lots that were transferred to the Plaintiff were invalidly issued by Registrar of Titles.

3.0 Application To Amend Fourth Amended Statement Of Claim

3.1 Order 20 Rule 5-(1) (2) and (5) of the High Court Rules provide:-

“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 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.

(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)

(4)

(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.”

3.2 The test to be applied when dealing with Application to Amend Pleadings was stated by Full Court of Fiji Court of Appeal in **Sundar v. Prasad** [1998] FJCA19’ Abu0022u.97s (15 May 1998) as follows:-

“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 waster as a result of it.”

- 3.3 In **Ambaram Narsey Properties Ltd v. Khan** [2001] FJHC 306; [2001] 1 FLR 283 (16 August 2001) his Lordship Justice Gates (current Chief Justice) adopted with approval the following principles in **Cropper v. Smith** (1884) 26 Ch. D. 700 p 710 Bowen L.J. said:-

“Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace.”

and his Lordship added at p 711:

“It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.”

- 3.4 His Lordship further stated that:-

“Amendment may be allowed “at any stage of the proceedings” which includes during a trial The Duke of Buccleuch [1892] P. 201, at p 211 per Lord Esher MR; G. L. Baker Ltd. v. Medway Building & Supplies Ltd. [1958] 1 WLR 1216. With some

reluctance the trial judge was prepared to allow the statement of claim to be amendment in Loutfi v. C Czarniow Ltd. (1952) 2 All ER 823 as late as after close of the case but before judgment.”

3.5 The amendment sought by the Plaintiff in the proposed Fifth Amended Statement of Claim is stated as follows:-

“7A. The Deed of Conveyance purported, in Clause (7) (“Clause (7)”), to contain a term to the effect that the National Bank of Fiji covenanted with TEL that the public facilities specifically defined as Lot 6 on DP 4797, Lot 1 on DP 4919 and Lot 1 on DP 4412 would remain available to all Taveuni Estates lotowners and purchasers free of charge in perpetuity.

7B. The wording of Clause (7) is so uncertain as to preclude TEL from enforcing its terms.

Particulars

Clause (7) is uncertain in the following respects:

- (a) neither it, nor the Deed of Conveyance generally define “Taveuni Estates lotowners and purchasers”;***
- (b) neither it, nor the Deed of Conveyance generally, define “public facilities”;***
- (c) if:***
 - (i) the expression “Taveuni Estates lotowners and purchasers” is capable of definition or interpretation, which is denied; and***
 - (ii) the expression “public facilities” is capable of definition or interpretation, which is denied; and***
 - (iii) the public facilities referred to in Clause 7 require funding in order for them to be made available,***

neither Clause (7), nor the Deed of Conveyance generally, provide who or what is to provide that funding in perpetuity if the “Taveuni Estates lotowners and purchasers” are not going to do so.

7C. Further or alternatively to paragraph 7B hereof, Clause (7) is void for uncertainty.

Particulars

The Plaintiff refers to and repeats the Particulars sub-joined to paragraph 7B hereof.”

3.6 It is apparent from the pleadings filed to date that provision of Clause 7 of the Deed is in issue between the Plaintiff and the First Defendant.

3.7 Further at paragraph 8 of Amended Defence to Amended Counterclaim filed by the Plaintiff on 23 July 2013 Plaintiff states as follows:-

“8. As to the allegations made in paragraph 54, the Plaintiff admits that Clause 7 of the Deed of Conveyance provides that the public facilities specifically defined as Lot 6 on DP 4794, Lot 1 on DP 4918 and Lot 1 on DP 4912 would remain available for the exclusive use of all Taveuni Estates lot owners and purchasers free of charge in perpetuity, but says that it does not know what the following expressions mean for the purposes of that clause:

(a) ‘public facilities’;

(b) ‘remain available’;

(c) ‘exclusive use’;

(d) ‘Taveuni Estates lot owners and purchasers’;

(e) ‘free of charge’;

and says further that the those expressions are vague and uncertain or further or alternatively, are not capable of definition in the context of the clause, and that as a consequence the clause is void for uncertainty.”

3.8 Even though this proceeding has been delayed by the parties for considerable time and has been subject to various amendment and striking out applications, I am of the view that the amendment sought by the Plaintiff should be allowed for the following reasons:-

(i) It is in the interest of justice that all issues relating to the Deed be finalised in this one proceeding rather than a new action being commenced;

- (ii) The amendment sought is not mala fide in view of the nature of the Deed and events that pre-dated or followed the execution of the Deed;
- (iii) The First Defendant will not be prejudiced in any way as it was well aware that Plaintiff was challenging the validity of Clause 7 of the Deed as appears at paragraph 8 of the Amended Defence to Counter Claim quoted at paragraph 3.7 hereof.


3.9 Obviously, First Defendant is entitled to costs of the Application.

4.0 Conclusion

I make the following Orders:-

- (i) Leave is granted to Plaintiff to amend its Fourth Amended Statement of Claim in terms of Proposed Fifth Amended Statement of Claim annexed as Annexure A to Plaintiff's Summons filed on 31 August 2011;
- (ii) Plaintiff do file and serve Fifth Amended Statement of Claim by 28 February 2014;
- (iii) First Defendant do file and serve Defence to Fifth Amended Statement of Claim by 11 March 2014;
- (iv) Plaintiff do file and serve Reply to First Defendant's Defence to Fifth Amended Statement of Claim (if necessary) by 20 March 2014;
- (v) Plaintiff do pay First Defendant's costs of the Application assessed at \$850.00 by 28 February 2014;
- (vi) This action be adjourned to 21 March 2014 at 9.30am for mention only.




K. Kumar
Judge

At Suva
17 February 2014