

IN THE HIGH COURT OF THE REPUBLIC OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 306 OF 2007

BETWEEN : **JOSEVATA WAQALAIVA VULUMA** of Regent Road,
Narewa, Nadi, Businessman.

1st PLAINTIFF

J VULUMA & VATUNITU & COMPANY a firm having
its registered office at Regent Road, Narewa, Nadi

2nd PLAINTIFF

AND : **MERCHANT FINANCE & INVESMTENT COMPANY**
LIMITED a limited liability company having its
registered office level 1 Ramarama House, 91 Gordon
Street, Suva

1st DEFENDANT

AND : **AUTOMART LIMITED** a limited liability company
having its registered office at 27 Saumata Street,
Lautoka.

2nd DEFENDANT

Appearances

Mr Fa for Plaintiff
Mr J Sharma for first Defendant
Mr Sudhakar for second Defendant

Date of Hearing : 4 September 2014

Date of Ruling : 26 January 2015

INTERLOCUTORY RULING

Introduction

[1] This ruling concerns with application to amend the statement of claim.

[2] By summons dated 6 March 2014 with Affidavit of Josevata Vuluma in Support (the application) plaintiffs seek the following orders:

1. That the plaintiff be granted leave to amend its statement of claim dated the 3rd of October, 2007, filed with its writ of summons issued by the court on the 5th of October 2007, and to file and serve on the defendant.

2. That the costs of this application shall be costs in the cause.

[3] This application is made pursuant to O. 20, r. 5 of the High Court Rules 1988 (HCR) and pursuant to the inherent jurisdiction of the court.

[4] First and second defendants object to the application. They filed affidavits sworn by Leonore Naivaliwaqa and Suresh Patel respectively.

[5] The application was heard on 4th September 2014, parties made oral submissions and they were ordered to file written submission as well. Both parties accordingly filed their respective written submissions.

Background

[6] The facts of this case relates to the Plaintiffs purchasing an Excavator and a 10 Wheeler Dump Truck (“Equipment”) from Auto Mart Limited (AML), the 2nd Defendant to be financed by Merchant Finance & Investment Company Limited (MFICL), the 1st Defendant. The Plaintiffs state that they were encouraged by MFICL to purchase the Dump Truck and Excavator from AML and that MFICL would finance

the same. The Plaintiff inspected the goods with AML. They proceeded to execute the Security Documents with MFICL. Upon inspection of the items, prior to delivery, they (plaintiffs) discovered that the goods were defective and refused to take delivery of the same. Prior to this, the Plaintiffs had paid MFICL the deposit of \$19,000.00 and had assigned shares in Fijian Holdings to the MFICL as security. Despite the Plaintiffs objections, MFICL made full payment to AML. The Plaintiffs did not take delivery of the goods. AML has sold the items to 3rd Parties and MFICL has liquidated the Plaintiffs' shares with Fijian Holdings Unit Trust. That resulted in the Plaintiffs filing its claim against the Defendants on 31st October 2007.

[7] Prior to the current application, the plaintiffs attempted to amend its statement of claim. However that application was withdrawn with the costs to the defendants. The current application has been made through his new solicitors.

The Law

[8] The application by the plaintiffs for amendment of pleading is made pursuant to O. 20. R. 5 of HCR which provides as follows:

"(1). 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 pleadings, 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) (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 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.”*

[9] In **Tildesley v Harper**, 10 ch D pp. 396, 397, Bramwell, L.J 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 this blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise:. “However negligence 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”

[10] Lord Griffs in **Kettma v Hansel Properties Ltd** [1987] A.C 189 said at 220:

“On the other hand it should be remembered that there is a clear difference between allowing amendments to clarify the issues in

dispute and those that provide a distinct defence or claim to be raised for the first time.”

Determination

[11] The plaintiffs seek leave of the court to amend its writ. The writ was filed in October 2007. Pleadings have closed and the matter was listed for trial on 18 & 19 of October 2011. At this stage amendment of pleading is not available as of right. Undoubtedly, the plaintiff may amend its pleadings with leave of the court.

[12] The Court may **at any stage of the proceedings** allow the plaintiff to amend his writ, or any party to amend his pleadings, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct, see O.20, r.5 (1). 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 the other parties, if the test is met, leave to amend may be given even at a very late stage of the trial. 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 expeditious conduct of trials. When leave to amend is granted, the party seeking the amendment must bear the costs of the party wasted, as a result of it, see **Peter Sujendra Sundar & Anor v Chandrika Prasad** [1997] ABU 22/97 (apf HBC 233/93) Decision 10 November 1997.

[13] I have read the original statement of claim and the proposed amended statement of claim. The claim of the plaintiff stems from the facts summarized in para 6 above. The original writ, *inter alia* claims that:

- a) The 1st defendant is to refund to the plaintiffs the sum of \$19,000.00.
- b) The 1st defendant is to release the charge it has over the plaintiffs' Fiji Unit Trust Shares.
- c) The 1st and 2nd defendants pay damages to the plaintiffs for loss of the opportunity to invest the sum of \$19,000.00 elsewhere.
- d) The 1st and 2nd defendants pay damages to the plaintiffs for loss of the opportunity to freely deal with the Unit Trust shares including liquidation and reinvestment.

[14] The proposed amendments to the writ elaborate the fact and issues to be determined between the parties. It also provides further and better particulars. The amendments to the pleading have been necessitated after reviewing the statement of claim by the plaintiffs' new solicitor. In para 8 of the affidavit in support, the plaintiffs state that, "***my lawyers reviewed the Statement of Claim that I have filed in this matter and based on their advice, I wish to now amend my Statement of Claim***".

[15] It is true that the original writ states that the plaintiffs approached the 1st defendant for finance on 28 August 2006 and signed security documents afterwards. Whereas in the proposed amended statement of claim the plaintiffs allege that they entered into a hire purchase agreement with the 1st defendant on the 26 April 2006. It appears to me the plaintiffs in the original statement of claim had stated signing security documents, instead of identifying it as hire purchase agreement. It will be noted that the claim in the proposed amended statement of claim is based on the same facts. It clarifies the issues in dispute between the parties.

[16] An amendment may be allowed 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, see O.20, r.5 (5).

[17] I have read the proposed amended statement of claim. It, in my view, does not introduce any new cause of action. Initially the plaintiffs claimed refund of \$19,000.00 and damages with orders for release of Charge over Unit Trust. In the proposed amended statement of claim also the plaintiffs claim the same relief but they have limited the damage to \$2 Million.

[18] I do not see the plaintiffs acting mala fide in bringing the amendments to their pleadings.

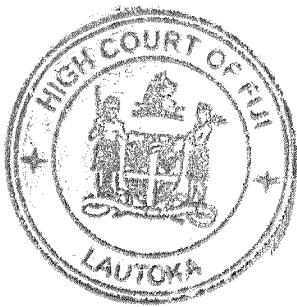
Conclusion

[19] For all these reasons, I would conclude that I should grant leave to the plaintiffs to amend its statement of claim as per the proposed amended statement of claim. The proposed amendment has been brought belatedly. However, it can be done without injustice to the defendants. There is no injustice if the other side can be compensated by costs. The defendants are entitled to costs wasted. I would assess the costs wasted at \$2,000.00. In that the first defendant will be entitled to the sum of \$1,300.00, and the second defendant will be entitled to the sum of \$700.00. The 1st defendant filed a written submission in these proceedings but the 2nd defendant did not.

Final Outcome

[20] The final outcome is that:

- I. Leave has been granted for the plaintiffs to amend their statement of claim dated 5th of October 2007.
- II. The plaintiffs will file and serve within 14 days their amended statement of claim as per their proposed amended statement of claim.
- III. The defendants will file and serve their amended statement of defence within 21 days thereafter.
- IV. The plaintiffs will file and serve within 14 days thereafter reply to amended statement of defence, if need be.
- V. The plaintiff will pay before the next mention date summarily assessed costs of \$2,000.00 to the defendants (\$1,300.00 to the 1st defendant and \$700.00 to the 2nd defendant).
- VI. The matter is adjourned before Master for mention only at 8.30am on 16 March 2015.
- VII. Orders accordingly.



M H Mohamed Ajmeer

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M H Mohamed Ajmeer
Puisne Judge
[Sitting as Master]

At Lautoka

26/01/15