IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 380 of 2008

BETWEEN	:	KAIAVA TADRAU & SELAI TADRAU
		PLAINTIFFS
A N D	:	FIJI NATIONAL PROVIDENT FUND
		1ST DEFENDANT
AND	:	THE NBF MANAGEMENT BANK OF SUVA, FIJI
		2ND DEFENDANT
COUNSEL	:	Mr. Kaiava Tadrau for the Plaintiffs. Ms. S. Devan for the first Defendant. Mr. K. Jamnadas for the second Defendant
Date of Hearing	:	14th July, 2015
Date of Ruling	:	07th August 2015

RULING.

[1] The plaintiffs, who are the husband and wife, instituted this action by way of originating summons against the 1st and 2nd defendants on 29th October 2008.

[2] The present application of the plaintiffs is for leave to make the 2nd defendant a party to this action or to continue the action against it.

[3] The plaintiffs' complaint to the Court is that the defendants have fraudulently debited a sum of $ 8000 from their accounts.

[4] It is not in dispute that on 04th May 2007 the Governor of the Reserve Bank of Fiji by a gazette notification published in terms of section 30(2)(c)(i) of the Banking Act, 1995 placed the 2nd defendant bank under controllership. When a financial institution is

placed under controllership, sections 43(1)(a) and 43(2) of the said Act become applicable.

[5] Sections 43(1)(a) and 43(2) of the Banking Act, 1995 provide as follows;

> ***(1) Where a licensed financial institution is declared to be subject to controllership, no person shall-***
>
> ***(a) Commence or continue any action or other proceedings including by way of counterclaim, against the licensed financial institution.***
>
> ***(2) Notwithstanding subsection (1) of this section, an action or proceeding may be commenced or continued against a licensed financial institution for the purpose of determining whether any right or liability exists if the leave of the controller or the High Court is first obtained.***

[6] It is thus clear that if any party who wishes to institute an action or other proceeding against a financial institution placed under controllership in terms of the above provisions, it is a prerequisite that such party must obtain leave either from the controller or from the High Court.

[7] The 1st plaintiff submits that as section 43 (1) and (2) of the Banking Act, 1995 has never been subjected to judicial scrutiny since its enactment the Court needs to interpret this section to ascertain the grounds on which the leave to institute proceedings against a financial institution could be granted. He submitted further in interpreting provisions of statutes the speech made by the Minister in charge of the subject in presenting the bill to the parliament is relevant and cited the decision in ***Pepper vs. Hart***[1] where it was held that as an aid to interpretation of statutes, the Court may refer to extrinsic material such as Hansard Reports.

[8] The submission of the 1st plaintiff that section 43 of the Banking Act, 1995 has not been subjected to judicial scrutiny since its enactment is incorrect.

[9] The learned counsel for the 2nd defendant submits that in the case of ***NBF Asset Management Bank vs. Taveuni Estates Ltd & Ors.***[2] Master Udith having considered previous authorities on this question laid down the following guidelines to be considered in granting or refusing leave under section 43(2) of the Banking Act, 1995.

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[1] **[1993] AC 593**
[2] **[2009] FJHC 260: HC HBC 0543.2004 (7th April 2009)**

(a) The strength of the applicant's case. It must be considered in the light of the rights or liabilities which the proceeding or action is set to determine.

(b) The seriousness of the issue to be determined by an action or proceeding.

(c) Whether judicial determination of the issues in the action is necessary for the controllership and/or for the determination of the issue at large between the parties.

(d) Delay in commencing or continuing an action or proceeding.

(e) Whether the issue is likely to be resolved in the ordinary course of controllership.

(f) Whether the applicant's right to have a claim determined by an impartial tribunal is likely to be defeated at the conclusion of the controllership, especially if the institution is to be wound-up.

(g) Whether the litigation may impede the prompt and efficient execution of the controller's statutory duty. This must be considered in conjunction with paragraph (c) above.

(h) Where there is a counter-claim, the Courts must pay heed to the statement of defence to the financial institution's claim. Where both the defence and the counter-claim are so intertwined, leave merely becomes a formality. A cause of action in a counter claim which is independent of the plaintiff's claim or the defence thereto is to be treated in the same manner as an originating claim.

[10] The learned counsel for the 2nd defendant objects the application of the plaintiffs for leave to add the 2nd defendant as a party on the following grounds;

1. ***The judgment in the earlier case [HBC 537/1997] between the same parties operates as res judicata to the present action.***
2. ***The plaintiffs have instituted these proceedings after the expiration of the period prescribed by the Limitation Act (Cap 35).***
3. ***The plaintiffs have failed to follow the correct procedure laid down in the High Court Rules, in that these proceedings should have been begun by way of writ of summons whereas the plaintiffs have come to Court by way of originating summons.***
4. ***There is undue delay in making this application.***

[11] The learned counsel for the 2nd defendant submits that the matter before this Court has already been adjudicated upon in another case between the same parties and

therefore, the decision in the earlier action operates as *res judicata* to the present action. It is common ground that the plaintiffs instituted the earlier action bearing No. HBC 537 of 1997 which was unsuccessful.

[12] *Res judicata* means once a particular matter is finally adjudicated upon by the Court it cannot be raised again between the same parties or their privies.

[13] Before deciding whether the decision in the earlier case operates as *res judicata* to the present case it is important for the Court to consider the facts of both cases. In the instant case the plaintiffs came to Court complaining that they discovered on 10th December 2007 that the 2nd defendant had debited their accounts with $ 8000 on 26th and 27th July 1995 as an amount due to be paid by them on a housing loan. The plaintiffs state further that they did not receive any response to the several letters sent to the 1st defendant seeking clarification on this matter.

[14] It is the position of the plaintiffs that they did not apply for a housing loan in 1995 nor did they receive $ 8000 under the FNPF Housing Assistance Scheme.

[15] As per the judgment in the earlier case the plaintiffs had gone before the Court seeking a declaration that they did not owe any sum to the National Bank of Fiji or to N.B.F. Asset Management Bank, the defendant in the said case. In that case the joint account of the plaintiffs was closed and the defendant established a loan account in early 1993 and the balance due to the bank on the said account by 09th November 2002 was $ 191,868.93.

[16] The question arises hear is whether the causes of action in both these cases arise out of the same transaction.

[17] In paragraph 3 of the affidavit of the 1st plaintiff dated 13th January 2009 and also in paragraph 14 of his affidavit dated 09th February 2009 he states as follows;

> ***The point in contention is the $ 8000 which is the root cause of the alleged fraudulent activities within the Civil Action HBC 537/97.***

[18] In the affidavit tendered to the Court on 30th March 2009 the 1st plaintiff states as follows;

> ***..... the first and the 2nd defendants have deliberately concealed the withdrawal of $ 8000. That this concealment was the cause of the***

fraudulent activities within the Civil Action HBC 537/97 and Civil Action 380/08.....

[19] This shows that the cause of action of the present case is part of the cause of action in the earlier case and the plaintiffs were aware of it at the time they instituted the earlier action. In paragraph 6 of his affidavit dated 13th January 2009 and also in the affidavit of 19th February 2009 the 1st plaintiff states that this matter was not highlighted at the trial in the earlier action and that they became aware of it only on 10th December 2007. In view of the depositions of the 1st plaintiff referred to above it cannot be believed that the plaintiffs instituted the earlier action without even knowing what the cause of action was. In any event with the dismissal of the earlier action all matters came to an end and the plaintiffs cannot separate this cause of action from the others and proceed with the present case.

[20] The learned counsel for the 2nd defendant, in this regard, relied on the decision in ***Chamberlain vs. Deputy Commissioner of Taxation***[3] where it was held as follows;

> The point of the present appeal is that the respondent brought an action against the appellant and recovered judgment against him. He obtained a judgment of the Court in which the cause of action upon which he relied merged, thereby destroying its independent existence as long as that judgment stood, and, so long as that judgment stands it is not competent for the respondent to bring further proceedings in respect of the same cause of action. It is no answer to say that the Court might, if appropriate, stay the second action as an abuse of process. The impediment goes deeper than that; *res judicata* may sustain a plea of abuse of process but in that case the appropriate remedy is to strike out the later action... So long as the respondent chooses, as he does, to take no steps to set aside the judgment and to raise no issue in the second action as to the circumstances in which judgment was obtained, he must accept consequences of *res judicata*.

[21] For these reasons I am of the view that the judgment in the earlier action (HBC 537/97) operates as *res judicata* to the present action.

[22] The learned counsel for the 2nd defendant submits that in terms of the provisions of Limitation Act (Cap 35) the cause of action of the plaintiff is out of time.

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[3] **[1988] HCA] 21; [1988] CLR 502**

[23] Section 15(a) and (b) of the Limitation Act provides as follows;

> Where, in the case of any action for which a period of limitation is prescribed by this Act, either-
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> *(a).* The action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> *(b).* The right of action concealed by the fraud of any such person; or
>
> *(c).* .....
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

[24] It is the contention of the learned counsel for the 2nd defendant that this action has been instituted by the plaintiffs outside period prescribed by the Limitation Act (Cap 35) which is six years.

[25] According to the depositions in affidavits of the 1st plaintiff dated 13th January 2009, 09th February 2009 and 30th March 2009, he has been aware of the alleged fraudulent act of the 2nd defendant, which is the subject matter of the present action, even in 1997 but the plaintiffs instituted these proceedings after more than ten years from the accrual of the cause of action. The action of the plaintiffs is therefore clearly out of time.

[26] The learned counsel for the 2nd defendant also submits that the plaintiffs have followed the wrong procedure in instituting these proceedings by way of originating summons. In terms of Order 5 Rule 2(b) of the High Court Rules read with Order 5 Rule 4 of the said Rules, an action based on an allegation of fraud must be begun by way of writ of summons. The question is whether this defect will vitiate the entire action of the plaintiffs. Order 28 Rule 9 of the High Court Rules provides that where, in a case of a cause or matter begun by originating summons, it appears to the court at any stage of the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun.

[27] Therefore, the fact that the action was begun by originating summons cannot be considered as a ground to refuse the application for leave by the plaintiffs to add the 2nd defendant as a party.

[28] The Banking Act came into effect in the year 1995. This action was instituted in the year 2008 about thirteen years later. The 2nd defendant bank was placed under the controllership in terms of the provisions of section 30(2)(c)(i) of the Banking Act, 1995 on 04th May 2007 and the plaintiffs should have, before instituting this action against the 2nd defendant, obtained leave under section 43(1)(a) of the said Act. It is also pertinent to note that there is a long delay in making this application. Assuming but not conceding that the plaintiffs were not aware of the alleged fraudulent act of the 2nd defendant at the time of instituting the present action, still there were sufficient materials in the affidavit filed on behalf of the 2nd defendant on 08th December 2008 which was almost three years prior to the making of this application. The plaintiffs have failed to explain this delay.

[29] For the aforementioned reasons I make the following orders.

ORDERS.

(1) The application of the plaintiff under section 43(2) of the Banking Act, 1995 for leave to make the 2nd defendant a party to this action is refused.

(2) The plaintiffs shall pay the 2nd defendant $ 1000 as costs (summarily assessed) of this application.

Lyone Seneviratne.

JUDGE.