

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 13 of 2011

BETWEEN : JOLLY GOOD FOODS LIMITED a limited liability company
having its registered office at 56 Naviti Street, Lautoka in the
Republic of Fiji.

PLAINTIFF

AND : DOMINION INSURANCE LIMITED a limited liability company
having its registered office at 231 Waimanu Road, Suva in Fiji.

DEFENDANT

BEFORE : Acting Master Vishwa Datt Sharma

COUNSEL : Mr. A. Narayan for the Plaintiffs
Mr. Ritesh Singh for the Defendant

Date of Hearing : 22nd June, 2015

Date of Ruling : 16th September, 2015

RULING

A. INTRODUCTION

1. The Defendant filed this **SUMMONS** and sought for the **setting aside** of the following orders made by the Master of the High Court-

- a) That the Order in terms of the Plaintiff's Summons for Amendment entered herein on 12th December, 2014 be set aside on the grounds appearing in the Affidavit of Wiliferiti Kamenio filed herein.

- b) That the proceedings of the substantive matter be stayed pending the hearing and determination of this application; and
 - c) That costs of this application be costs in the cause.
2. This application is made pursuant to the Inherent Jurisdiction of this Honourable Court.
 3. The matter was argued in court on 22nd June, 2015 at 11.30 am.

B. BACKGROUND.

The Defendant's case,

4. The Defendant filed an affidavit in support deposed by Wilifereti Kamenio who stated as follows:-
 - (i) "Our firm received instructions to appear in this matter when it was called for mention before the Master Mr. V D Sharma on 12th December, 2014. I am informed by Mr. Vananalagi that the instructions were that:
 - (a) The trial dates in this matter were previously fixed for 22nd to 24th September, 2014;
 - (b) The trial was vacated due to the Plaintiff filing a Summons to Amend the Statement of Claim on the date of the trial;
 - (c) The Defendant objected to the late filing since the Plaintiff attempted to add a further cause of action;
 - (d) The Court directed the Defendant to file an Affidavit in Response and adjourned the matter to 1st December, 2014;
 - (e) The Court did not sit on the above date and a NOAH was issued for the matter to be called last Friday on 12th December, 2014.
 - (ii) Our Mr. Vananalagi attended Court on 12th December, 2014 and met Mr. Ritesh Singh, the solicitor from Sherani & Co. appearing on behalf of the Plaintiff prior to the commencement of the cases and informed Mr. Singh that he will be asking for further time to file an Affidavit in Response since the solicitor in carriage of this matter Mr. Patel was urgently transferred to New Zealand for medical treatment and that the CEO for the Defendant had left and AK Lawyers were trying to obtain information from the Claims Manager.

- (iii) I am informed by Mr. Vananalagi that there was a long list of cases before the Master on the above date and our firm also had a criminal matter before Justice Madigan in High Court No. 3. While the Master was still going through the list Mr. Vananalagi rushed off to Justice Madigan's court to attend to that case.
- (iv) Upon Mr. Vananalagi's return to the Master's Court he met Mr. Singh at the door who informed Mr. Vananalagi that the matter was just called and the Master had granted orders in terms of the Plaintiff's Summons. Mr. Vananalagi requested Mr. Singh to wait to have the matter recalled but Mr. Singh just left.
- (v) Thereafter I am informed by Mr. Vananalagi that he had the matter recalled but was advised by Mr. Sharma that he should make the necessary application to set aside the orders granted earlier. Mr. Sharma was advised of the reason provided in the instructions from AK Lawyers detailed in paragraph 3 above.
- (vi) We immediately proceeded to prepare the present Application to Set-Aside.
- (vii) I have been advised by Mr. Vananalagi that the Defendant has a good defence in the matter and seek that the Order of Master on 12th December, 2014 be set aside and the Defendant be given leave to file its Affidavit in opposition to the Amendment and the Defendant be allowed to argue the issue of costs on the vacating of the trial and also on the new issues that the Plaintiff attempted to amend.
- (viii) That I verily believe that no prejudice will be caused to the Plaintiff if leave is granted to the second Defendant to set aside the order of the Master on 12th December, 2014. In the alternative, I am informed by Mr. Vananalagi that substantial prejudice will be caused to the Defendant if the Master's order is not set aside as the court has yet to deal with the issue of costs for the vacating of the trial date. There will be a miscarriage of justice as the Plaintiff would have been allowed to amend its pleadings after a number of years just prior to the actual trial date. I am further informed by Mr. Vananalagi that by allowing the order to go in, the Defendant would be prejudiced by not being heard and given an opportunity to oppose the application contrary to its Constitutional rights'. *(Noted there is no second defendant to this proceeding).*

5. The Defendant in his oral submissions also submitted the following-
- (i) Mr. Vananalagi did inform Mr. Singh that they were objecting to the amendment application.
 - (ii) Court to determine the credibility whether to accept Mr. Vananalagi's or Mr. Singh's view.
 - (iii) Application was going to be opposed.
 - (iv) Mr. Vananalagi went out of court.
 - (v) May be a simple matter on policy.
 - (vi) This is a claim of specific nature for consequential damages.
 - (vii) Issue is of prejudice and just made limitation period.
 - (viii) Seek setting aside order and file an affidavit as to why amendment is being objected to.
 - (ix) There is no delay and no prejudice to the Plaintiff.

The Plaintiffs' Case,

6. The Plaintiff filed an affidavit in reply and stated as follows-
- (i) The matter was set down for trial before Mr. Justice Corea from 22nd to 24th September, 2014.
 - (ii) The Plaintiff's application dated 8th August, 2014 to amend Statement of Claim was listed before the court on 3rd September, 2014.
 - (iii) The application was supported by an Affidavit of Rajesh Patel.
 - (iv) Mr. Nagin appeared for the Plaintiff and Mr. Vananalagi appeared for the Defendant on 3rd September, 2014 and by consent, the trial dates fixed for 22nd to 24th September, 2014 were vacated with no order as to costs.
 - (v) The Plaintiff's application was adjourned for hearing on 1st December, 2014 at 11.30 am.
 - (vi) The court gave Defendant to file Affidavit in reply by 24th September, 2014 to oppose Plaintiff's application.
 - (vii) The Defendant has not filed any Affidavit in opposition to Plaintiffs application.

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- (viii) On 01st December, 2014 the Plaintiff's application was listed for hearing at 11.30 am. Our Mr. Singh came to court but I am advised by Mr. Singh that hearing didn't proceed as there was a notice on the Master's Chamber at the Tax Tribunal Court Room No. 2 that all matters before the master is vacated until further notice. NOAH will be issued to parties.
- (ix) At 2.36 pm, on 01st December, 2014 our office received fax from the High Court Registry advising that the matter is vacated and it will be called on 12th December, 2014 at 9.00 am.
- (x) That Mr. Vananalagi did speak to Mr. Ritesh Singh in court on 12th December, 2014 and he only told Mr. Singh that the Defendant will seek further time to file affidavit in reply. I am further advised by Mr. Singh that he informed Mr. Vananalagi that the Plaintiff will oppose any further extensions as ample time was given. Thereafter no further communication took place in regards to the matter.
- (xi) Informed by Mr. Singh that Mr. Vanavalagi was in Court on 12th December, 2014 but he stepped out without informing the Court or telling Mr. Singh to stand down the matter or making arrangement for someone to appear on his behalf.
- (xii) Informed by Mr. Ritesh Singh that when the matter was called there was no appearance made by the Defendant in Court on 12th December, 2014 and Mr. Singh sought Orders in terms of the Plaintiff's application. The Master asked Mr. Singh any opposition filed to which Mr. Singh advised Court that no Affidavit in Reply filed. The Court therefore granted the Orders as per Plaintiff's Summons dated 8th August, 2014. The Master of the Court also ordered the Plaintiff to serve the same on the Defendant and adjourned the matter to 3rd February, 2015. When the matter was called on 3rd February, 2015 again there was no appearance by the Defendant.
- (xiii) Informed by Mr. Singh that he was leaving the Court room, he met Mr. Vananalagi at the entrance of the Tax Tribunal Court Room No. 2. Mr. Singh then informed him that the Master had granted Orders in terms of the Plaintiff's Summons. Mr. Vananalagi didn't say anything to Mr. Singh.

- (xiv) The Orders made by the Master on 12th December, 2014 the Amended Statement of Claim was filed on 17th December, 2014 and served on 7th January, 2015. The Order was served on 20th January, 2015.
- (xv) I am not aware of the contents of paragraph 7 and 8 of the said Affidavit.
- (xvi) The Defendant could have filed its Defence to Plaintiff's Amended Statement of Claim by now and matter would have taken its normal course. I further say that the Defendant has not complied with the Order made by the Master on 3rd September, 2014 and now asking further time to file Affidavit when Court already granted Plaintiff to file its Amended Statement of Claim.
- (xvii) There has no appearance by the Defendant on two occasions i.e. on 12th December, 2014 and 3rd February, 2015.
- (xviii) In relation to cost as stated in paragraph 10 of the said affidavit and I further say that our file records says that the hearing date was vacated by consent and no order for costs was made. Therefore am advised that Defendant's said argument is frivolous.
- (xix) The Defendant will not suffer any prejudice as Defendant has all the documents and records which they can refer to in order to prepare and file Statement of Defence to Amended Statement of Claim. All that the Plaintiff is seeking to include the Consequential Policy to its Statement of Claim and Defendant is aware of the policy. The Defendant by now should have filed Defence to amend claim to save time rather than argue on the costs issue.
- (xx) The defendant should not be allowed to argue any issue of costs and the new issues to the amendments as there will be no prejudice caused to the Defendant if the Master's Orders are not set aside.
- (xxi) The Defendant's application is misconceived and is abuse of Court's time therefore the same be struck out with costs.

7. The Plaintiff further submitted through their written submissions as follows-

- (i) The Plaintiff's business was damaged due to the fire at its premises on or about 7th October, 2009 when the Plaintiff's policy with the Defendant was valid and in force.

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- (ii) The matter was called on 7th March, 2014 before Justice Corea and his Lordship fixed the trial dates for 22nd, 23rd and 24th September, 2014.
- (iii) During the preparation for the trial, it was discovered that the Plaintiff also had a Consequential Loss Policy with the Defendant Company which was not disclosed to its Solicitors at the initial stage. The Consequential policy was also in force and valid at the time the Plaintiff suffered loss due to the fire at its premises.
- (iv) As soon as this was discovered, the Plaintiff made an application on 7th August, 2014 to amend its statement of claim by including claim under the Consequential Loss Policy.
- (v) The summons to amend the statement of claim was supported by an affidavit of Rajesh Patel and both the summons and the affidavit in support were served on the Defendant's solicitor's city agent on 12th August, 2014.
- (vi) The summons was returnable on 3rd September, 2014 when Mr. Nagin appeared for the Plaintiff and Mr. Vananalagi for the Defendant and the following orders were made;
- (a) Affidavit in reply by defendant to be filed by 24th September, 2014.
 - (b) Any reply thereafter by the Plaintiff on or before 8th October, 2014.
 - (c) By consent the hearing dates for 22nd, 23rd and 24th September, 2014 was vacated and
 - (d) The summons to amend was adjourned for hearing to 1st December, 2014 at 11.30 am.
8. On 1st December, 2014 there was no affidavit in opposition filed by the defendant and therefore the registry notified the defendant that the matter is adjourned to 12th December, 2014. On 12th December, 2014 still no affidavit was filed by the defendant and orders in terms of the summons to amend the statement of claim was granted and the case adjourned to 3rd February, 2015.
9. The Plaintiff filed and served the amended statement of claim with a letter on the defendant on 22nd December, 2014.

10. Again no appearance by the Defendant when the matter was called on 3rd February, 2015 but the defendant filed his application seeking setting aside of the masters orders.

C. THE LAW.

11. The law regarding **Inherent Jurisdiction of the court** is set out in *Vol. 37 of Halsbury's Laws of England* at paragraph 14 where it is said and I quote: -

"The overriding feature of the inherent jurisdiction of the court is that it is a part of procedural law, both civil and criminal, and not a part of substantive law; it is exercisable by summary process, without a plenary trial; it may be invoked not only in relation to parties in pending proceedings, in relation to any one, whether a party or not, and in relation to matters not raised in the litigation between the parties; it must be distinguished from the exercise of judicial discretion; and it may be exercised even in the circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise-

- (1) control over process by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process,*
- (2) control over persons, as for example over minors and mental patients, and officers of the court, and*
- (3) control over the powers of inferior courts and tribunals.*

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

D. Analysis and Determination

12. I have perused the entire court file right from the time of the commencement of the proceedings to the present time of filing of the pleadings to the final impending application of the Defendant seeking setting aside of the masters orders.
13. The proceeding was commenced by the Plaintiff by filing a Writ of Summons on 14th January, 2011.

14. Acknowledgment of service was filed on 26th January, 2011 followed by the Defence on 18th March, 2011.
15. Reply to Defence and the Summons for Directions were filed on 07th June, 2011.
16. Orders on the Summons for Directions were made on 27th June, 2011.
17. Hereinafter, the Defendant filed a 'Summons' and sought for further and better particulars of the Statement of Claim. Directions were made on this 'Summons' for parties to comply. The file record shows that directions made by the court with regards to this application were never complied with.
18. Affidavit verifying Defendant's list of Documents was filed on 11th January, 2012, whilst the Plaintiff's list of documents was filed on 25th January, 2013.
19. Notice of Intention to proceed was filed by the Plaintiff on 06th November, 2012 and Notice requesting for pre-trial conference filed on 11th January, 2013.
20. Summons for dispensation of Pre- Trial conference minutes was filed by the Plaintiff on 15th February, 2013. Orders were granted and the minutes of Pre-Trial conference was only filed by the Plaintiff on 12th November, 2013. The Defendant did not endorse the PTC minutes filed by the Plaintiff.
21. Affidavit verifying Plaintiff's list of documents filed on 25th January, 2013 and Affidavit in support of an application for a pre-trial conference to be held/dispensed with filed on 15th February, 2013.
22. Summons for specific discovery was filed by the Defendant on 05th March, 2013.
23. Copy pleadings filed by the Plaintiff on 18th November, 2013 together with Order 34 summons to enter this action for trial.

24. On 07th August, 2014, the Plaintiff filed a Summons and sought leave of this court to amend the Statement of Claim and the court registry assigned 03rd September, 2014 as the returnable date on this Summons.
25. On 03rd September, 2014, Mr. Vananalagi appeared on instructions of Mr. A.K. Narayan and was granted 21 days to file their affidavit in opposition by 24th September, 2014 and the Plaintiff 14 days thereafter for any reply. Matter adjourned to 01st December, 2014 but vacated to the 12th December, 2014. On 12th December, 2014, this court having considered that the Defendant has not filed any affidavit in opposition and further, no appearance made by Mr. Narayan or the city agent counsels, an order was granted in favour of the Plaintiff for leave to amend their Statement of Claim and serve the Defendant. The matter was then adjourned to 03rd February, 2015.
26. Later at 10-20 am. After the case was adjourned that Mr. Vananalagi appeared on instructions from Mr. A.K. Narayan and informed court that he was before Hon. Justice Madigan.
27. Since the Plaintiff's Counsel was not present when Mr. Vananalagi appeared to make this application, this court in the absence of the Plaintiff's counsel, could not hear Mr. Vananalagi's application rather informed Mr. Vananalagi to make a formal application and serve the other party.
28. The Plaintiffs filed their amended statement of claim on 17th December, 2014.
29. The Defendant filed a Summons to set aside master's order of 12th December, 2014 some 10 days from the date of the order made for the amendment of the statement of claim.
30. The Plaintiff strongly objected to the setting aside application and the matter proceeded for a hearing on 22nd June, 2015.

31. It can be ascertained from the Plaintiff's application seeking amendment of the Statement of Claim , that in essence the Plaintiff sought the amendment with regards to the 'Consequential Loss Policy' and on the whole, the amendment sought was not substantial and that did not tantamount to a new cause of action, but still related to the Insurance policy.
32. *Order 20 Rule 5(1) of the High Court Rules, 1988, deals with the Amendment of writ or pleadings with leave and clearly states as follows-*
- 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. (Underline is mine for emphasis).*
33. *Order 20 Rule 5* does not place any restriction on parties seeking amendment at any time of the proceedings, provided leave was appropriately sought for.
34. In the present case before the court, the Plaintiff did make an application for leave to amend their Statement of Claim and served the same on the Defendant. The Defendant appeared on the returnable court date and was granted time to file an answering affidavit as sought for. Time given lapsed, the Defendant failed to comply with the Master's directions of 03rd September, 2014. The Defendant could have still come back to court and sought further extension of time to file and serve the answering affidavit to the Plaintiff's application seeking an order to amend their claim. For the reasons best known to the Defendant, they failed to do so and accordingly, the court acceded to the Plaintiff's application and granted the orders accordingly on 12th December, 2014. The Defendant or his Counsel and the city agents failed to make any appearances before this court on this day.

35. Reference is made to the following cases which deal with amendments to applications and pleadings-

(i) *Kettleman and others v Hansel Properties Ltd (1988) 1 All E R 38* where it was observed-

'the rule is that amendment should be allowed if necessary to enable the true issues in controversy between the parties to be resolved, and if allowance would not result in injustice to the other party not capable of being compensated by an award of costs'.

(ii) *Reddy Construction Company Ltd v Pacific Gas Company Ltd (1980) FJCA 9; (1980) 26 FLR 121 (27 June 1980)*, where it was held-

'the primary rule is that leave may be granted at any time to attend on terms if it can be done without injustice to the other side. The general practice to be gleaned from reported cases is to allow an amendment so that the real issue may be tried, no matter that the initial steps may have failed to delineate matters. Litigation should not only be conclusive once commenced, but it should deal with the whole contest between the parties, even if it takes some time and some amendment for the crux of the matter to be distilled. The proviso, however that amendment will not be allowed which will work an injustice is also always looked at with care. So in many reported cases we see refusal to amend at a late stage particularly where a defence has been developed and it would be unfair to allow a ground to be changed'.

(iii) *Peter Sujendra Sundar and anor v Chandrika Prasad Civil Appeal No. ABU 0022/97*, the court of appeal at page 9 appropriately summarised the reasoning and the test for the permission to grant or refuse an amendment 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 that effect are usually allowed, unless the other party will be seriously prejudiced thereby (G.L. Baker Ltd. V. Medway Building and supplies Ltd [1985] 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 the 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)).' (emphasis is added).

36. The court record confirms that the Defendant was granted 21 days time on or before 24th September, 2014 to file their affidavit in opposition to the Plaintiffs leave application to amend the Statement of Claim. After the matter was adjourned to 01st December, 2014 and vacated to 12th December, still this court discovered that neither there was any appearance by Counsel for the Defendant nor any affidavit in opposition was filed. The Plaintiff Counsel then made an application to this court and sought for the orders be granted in terms of their pending application. The court then acceded to the Plaintiffs application and granted the order for leave accordingly.
37. Reference is made to the following cases-
- (i) HBC 306 of 2007- *Josevata Vuluma & anor v Merchant Finance & Investment Company Limited* – Hon. Justice Ajmeer said-
'the Plaintiff's 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 pleadings is not available as of right. Undoubtedly, the Plaintiff may amend its pleadings with leave of this court'.
 - (ii) At paragraph 16 in the same case, the court said –
'an amendment may be allowed notwithstanding that the effect of the amendment will be to add or substitute a 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)'. Hon Judge granted the order in terms of the application.

38. The Defendant deposed in their affidavit in support of their setting aside application that the Plaintiff were bringing in a new cause of action in the matter and therefore the master's order should be set aside.
39. On the other hand, the Counsel for the Plaintiff made it very clear in his submissions that he was not bringing in a new cause of action rather sought for an amendment was made in terms of the 'Consequential Loss Policy' which was not in Plaintiffs possession at the time of filing and commencement of the proceedings by Writ action.
40. Amendment was later sought when the Plaintiff discovered that there was a 'Consequential Loss Policy' issued by the Defendant Company and was very much still effective.
41. What is sought here is not to introduce a new cause of action, but to include the 'Consequential Loss Policy' into the Plaintiffs Statement of Claim, not covered for in the original Statement of Claim of the Plaintiff.
42. The Defendant will be able, of course, to plead every defence that is relevant to the Amended Statement of Claim. This includes its right and capacity to plead in terms of the 'Consequential Loss Policy' as well. Not only that, the Amended Defence will allow the Defendant to incorporate new paragraphs together with any new provisions required to be incorporated in consequence of the amendments made to the original Statement of Claim by the Plaintiff.
43. The issues raised by the Defendant herein require a proper hearing in the substantive action, so that the matters raised by the Defendant can be agitated and addressed by both parties and so that the Court has an opportunity to address these arguments and issues in the course of hearing the substantive action in its entirety.

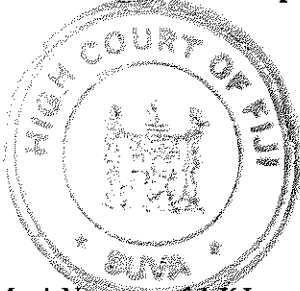
44. As to the issue of prejudice raised by the Defence Counsel, if amendment allowed was not set aside by their application before the court, the amendment allowed does not bring in a new cause of action, since the same has been carried out under the 'Consequential Loss Policy'.
45. The Defendant will be at liberty to counter the amendment upon filing an amended Defence to the Amended Statement of Claim. It will be borne in mind of the Defence Counsel representing the Defendant Insurance Company that he was aware of the "Consequential Loss Policy" at the time of service of the Writ of Summons by the Plaintiff, and therefore should have divulged this information on the 'Consequential Loss Policy' to the Plaintiff, rather than the same being surfaced at the later stages of the hearing of this case.
46. I find there will be no prejudice caused to the Defendant if the Plaintiffs leave to amend the Statement of Claim is not set aside by this court.
47. Accordingly, I make the following final orders.

Final Orders

1. The Defendant's Summons to Set Aside Master's Orders of 12th December, 2014 is struck out accordingly.
2. The Plaintiff to File and Serve an amended Statement of Claim within 14 days from today.
3. The Defendant to File and Serve their Amended Statement of Defence within 14 days thereafter upon service of the Plaintiffs Amended Statement of Claim.

4. The Plaintiff to File and Serve any Reply to the Amended Defence within 14 days thereafter.
5. Each party to bear their own costs.
6. Matter stands adjourned to a later date for further directions

Dated at Suva this 16th of September, 2015.



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VISHWA DATT SHARMA
ACTING MASTER HIGH COURT, SUVA

cc: *Mr. A Narayan of A K Lawyers, Ba.*
Mr. Ritesh Singh of Sherni & Co., Suva.