

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

CIVIL ACTION NO.: HBC 339 of 2014S

BETWEEN : **GANGULAMMA aka GANGALLAM aka GONGLAMMA aka
GANGALAMMA REDDY aka GANGULLAMA aka
GANGULAMMAL REDDY aka BELLA REDDY aka
GANGULAMMA REDDY as Administratrix of the Estate of
Ranjana Reddy aka Rajana aka Shiu Narayan aka Shiu
Narayan Reddy aka S.N. Reddy**

PLAINTIFF

AND : **YANKTESH PERMAL REDDY**

FIRST DEFENDANT

AND : **REDDY CONSTRUCTION COMPANY LIMITED**

SECOND DEFENDANT

APPEARANCES/REPRESENTATION

PLAINTIFF : Mr D Sharma on instruction with Mr A Khan [Khan & Co.]
DEFENDANT : Mr V Singh [Parshotam & Co]
RULING OF : Acting Master Ms Vandhana Lal
DELIVERED ON : 20 March 2019

INTERLOCUTORY RULING

[Third Amendment to the Statement of Claims by the Plaintiff and Striking Out by the Defendant]

Applications

1. There are two application for determination by this Court:
 - a. A motion dated 2 August 2017 by the plaintiff to further amend its second amended statement of claim dated and filed on 10 May 2017; and
 - b. Summons dated 13 June 2017 by the defendant for the action to be struck out and dismissed pursuant to Order 33 rule 3 and Order 18

rule 18 of High Court Rules and Sections 4, 9, 10 of the Limitation Act.

2. The plaintiff in Support to her application for amendment filed an affidavit of one Natasha Priyanka Kumar sworn on 2 August 2017.

The defendant filed an affidavit in response of one Giyananand Naidu sworn on 20 October 2017.

The plaintiff thereafter filed her reply on 27 October 2017.

3. There is no affidavit evidence for the defendants' application for striking out.

Preliminary Issues

4. The defendants have in their submission raised certain preliminary issues as follows:

Notice of Motion being defective

5. According to the defendants, the plaintiff's notice of motion has contents that of a summons.
6. Order 8 rule 3(1) provides for form of the notice of motion. Under rule 3(2) the notice of motion is to include concise statement of the nature of the claim made or the relief or remedy required.
7. The motion filed by plaintiff dated 2 August 2017 is not as per Form 7 in the appendix to the High Court Rules. However the nature of claim made and relief sought is concise.
8. I find this irregularity not to be fatal and can be cured by exercising courts discretion by asking them to file amended notice of motion as per Form 7 of the appendix.

Affidavit in Support

9. According to the defendants, the motion is supported by an affidavit of a counsel from the office of the plaintiff's solicitor. There is no authority annexed for the solicitor to swear the affidavit on behalf of the plaintiff. Paragraphs 4 to 12 are facts that cannot be deposed by the solicitor in an application to amend.
10. **Order 41 rule 1(4)** of the **High Court Rules** reads:
"Every affidavit must be expressed in the first person and, unless the Court otherwise directs, must state the place of residence of the deponent and his or her occupation"
11. Pursuant to **Order 41 rule 5(2)** "*an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and ground thereof*".

12. The deponent of the affidavit in support is Natasha Priyenka Kumar employed by Messrs Khan & Co solicitors for the plaintiff.

She is deposing the matters that are within her knowledge as solicitor and from the information provided to her in the course of her duties within the office in regards to the case.

Apart from matters within her direct knowledge, she is informed by the Plaintiff and verily believes the same is true.

13. She has identified the original source to her of the instruction and some of the facts deposed are her personal knowledge as counsel.
14. Hence I find the affidavit is admissible and will be used for determination of the applications.

Plaintiff's Application for further amendment to her Second Amended Statement of Claim

15. As per the affidavit in support the difficulties in respect to finalising the statement of claim by the plaintiff arise directly from the claim against the first and second defendants.

The conduct complained of began in 1958 and followed the first defendant's incorporation of the second defendant in 1962 and operation of the business which is subject of the dispute since.

Hence the plaintiff was not aware and able to take action until 2014 when the first defendant for the first time denied any entitlement by the plaintiff and invited court action.

The claim is largely based in equity involving breach of promise, trust, fiduciary and other duties and relationships and fraud.

A draft amended statement of claim has been made available to the defendant's solicitors.

Time has been taken to amend the claim since the relevant events took place long time ago; due to death of plaintiff's husband who was an important witness and had relevant dealings with the defendants; due to the need to corroborate evidence; the on-going refusal by the defendant's to co-operate concerning revelation of the necessary information and documents; a status quo contrary to a timely alternate resolution of the matter; and the need to change counsel.

Since the defendants through their solicitors have been put on notice for sometimes about the amendments there will be no prejudice caused to the defendants if amendment is allowed. They can be compensated with reasonable costs.

Plaintiff and her family suffer greater prejudice if the claim is struck off without evidence being heard.

16. In response, the defendants submits that the proposed third amended statement of claim is a completely new document and introduces new allegations of facts and brings in new causes of action founded on fraud.

According to them there is nothing in the pleadings (current or proposed) regarding the allegation that the first defendant requested the plaintiff or her late husband not to take out any proceedings.

And nothing prevented the plaintiff from taking out the proceedings earlier. During this time other family members had also taken out proceedings against the first defendant.

The plaintiff is now bringing in allegation of fraud, something which was absent from her earlier claims and something that did not materialise after the filing of the last claim and it would have been present at the time the writ of summon was filed (on 28 November 2014).

As such the allegation of fraud, ought to have rightfully pleaded in the first claim.

The application for further amended statement of claim is prompted by the defendants' application for an order that the plaintiff's claim be struck out.

If plaintiff is allowed the amendment introducing a fresh cause of action will seriously prejudice the defendant's position especially since the defendant are relying on defences of laches; limitation and abuse of process and plaintiff is bringing in the allegation of fraud to get around these defences.

Further the amendment has put the defendant to significant cost.

Substantive Claim (Second Amended Statement of Claim)

17. The plaintiff is the administratrix of the estate of Shiu Narayan her late husband.

According to the plaintiff, the deceased had shares and/or a beneficial interest in the second defendant Reddy Construction Company Limited.

The first defendant is sued in his capacity as purported trustee, administrator-de-son-tort of the estate and/or the estates interest and a director and chairman of the Board of Directors of the second defendant.

The first defendant sold/transferred his shares in second defendant to YP Reddy Holdings Limited without the knowledge or consent of the deceased Shiu Narayan.

It is alleged that sometimes in 1947 and 1949 Ram Sami Reddy and the deceased had entered into an unwritten open-ended fiduciary relationship in the nature of a partnership and/or joint venture for the purpose of building houses and commercial buildings and acquiring and/or developing particular property and in some cases for resale.

Later sometimes in 1950 another brother Ranga Sami Reddy joined the partnership, said partnership was called Reddy Construction Company.

Ram Sami Reddy and Ranga Sami Reddy would look after the administration and financial affairs whilst the building construction affairs were to be carried out under the supervision of the deceased Shiu Narayan.

For the partnership it is claimed the plaintiff had used her 30 pieces gold (she received from her in-laws on her marriage) as security and collateral to obtain a loan.

In 1957 the first defendant who is the fourth brother was to join the partnership. It was represented to Shiu Narayan that it would be undesirable to formally have four (4) shareholders/partners as it would be difficult if there was disagreement.

Therefore it was agreed that the deceased Shiu Narayan would not be a formal shareholder/partner but he would be equally treated in financial rewards from the partnership.

It is alleged Shiu Narayan was promised the following (if he forego being a former director and a shareholder):

- He will be treated equally in financial rewards from the partnership as if he were a shareholder/partner and his financial investment and interest was secured and will continue to grow;
- Shiu Narayan and his family will get same privileges and benefits as the other three brothers;
- He will be provided a bigger house to live in in as their own.

In 1958 Shiu Narayan advanced/invested £1868/8/1 (equivalent to FJ \$4, 859.07) to the venture.

In 1962 the brothers incorporated the venture into a limited liability company that is the second defendant with the aim and specific object of carrying on the same business of Reddy Construction Company and with the same representation and understanding and agreements as all the four brothers had in Reddy Construction.

According to the plaintiff, the sum so advanced by Shiu Narayan in 1958 was in the subsequent years recorded in the second defendant Company book as owing to Shiu Narayan. This was subsequently removed or unaccounted for. The sum was never repaid to Shiu Narayan.

When asked Shiu Narayan was assured that the money was invested in the company and it was growing.

It is alleged the defendants failed to and/or neglected to provide Shiu Narayan full and proper account with respect to his financial interests and shares therein.

The plaintiff alleges that Shiu Narayan also searched for documents relating to his shareholdings/entitlements/financial interest but document were either destroyed and/or hidden from him.

There are allegation of breach of fiduciary duty owned by the defendants to Shiu Narayan. Particulars of breach are outlined in paragraph 5.1 to 6 of the second amended statement of claim.

The Proposed Amendment

18. As per the draft amendment it can be noted the proposed statement of claim has been altered/amendment in total including layout and style.

The plaintiff has outlined the capacity in which she is suing. She also outlines the capacity in which the first and second defendants are being sued.

Allegations are that the first and second defendants are in breach of their obligation (paragraph 27).

On paragraph 28, the plaintiff alleges fraud committed by the first defendant for himself and on behalf of the second defendant.

The allegation of fraud on paragraph 28 of the proposed third amendment is something new and was not pleaded in earlier statement of claims.

Law on Amendment

19. **Order 20 rule 5 (1), (4) and (5)** of the **High Court Rules** reads:

- " (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 or her Writ,or pleadings, on such term as to costs or otherwise as may be just and in such manner (if any) as it may direct.*
- (2)*
- (3)*
- (4) An amendment to alter the capacity in which that party had at the date of the commencement if the proceedings or has since acquired.*
- (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect if 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 and 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".*

20. General principle is that there is a power to allow an amendment at any stage of the proceedings. However as the case proceeds the court may be reluctant to allow amendments that change or redefine the issues – **Woods v Chalelf unreported English case May 28 1999.**
21. Late amendments could undermine the just resolution of a dispute rather than advance it. They may delay the final resolution, cause confusion, or waste litigant and court resources – **Bullen & Leake & Jacob's Precedents of Pleading (18th Ed) Volume 1 at page 33.**
22. Addition of time barred cause of action will usually be permitted where the new cause of action is simply a fresh legal formulation of the plaintiff's case; involving no factual allegation other than those already pleaded as found in the original causes of action, and involving no new head of relief than those already pleaded – **Conticorp SA v. The central Bank of Ecuador [2007] UKPC 40.**
23. The commentary to order 20 rule 5 in **The Supreme Court Practice Volume 1 (1993)** at paragraph 20/5-8/22 reads:

"Although it has been stated that it is "the universal practice, except in the most exceptional circumstances not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance" (per Lord Esher M.R. in Bentley v Black (1893) 9 T.L.R 580; cf Hendricks v Montagu (1881) 17 Ch. D. 638 p. 642; Symonds v City Bank (1885) 34 W.R. 364; Lever v Good Win [1887] W.N. 107 C.A) yet such an amendment may be allowed at an early stage.

There is indeed no rule of practice that allegation of fraud have to be pleaded at the outset and could not be added by amendment and amendments alleging fraud are no different from other amendments which are allowed on the general principle that all amendments are allowed so that the real matters in controversy between the parties are before the Court.

In deed when it appears that there has been no "over reading" on the part of the plaintiff in the sense of taking advantage in an improper way, nor any unreasonable delay on his part, the Court may in its discretion of the circumstances justify it allow allegation of fraud to be added by amendment to the writ and statement of claim at a late stage in the action"

Finding

24. In the initial statement of claim, the plaintiff pleaded that the defendants owed a fiduciary duty and there was a breach of the fiduciary duty.

Plaintiff seeks from the defendants jointly and severally the following relief:

- a) An account of profits.

- b) Damages for such sum as is determined by the Court to carry out the accounting.
- c) Appointment of an accountant approved by the Court to carry out the accounting.
- d) A declaration that the plaintiff as the administratrix of the estate is entitled to seek and have access to all the records of the second defendant company in the same manner in which a shareholder is permitted to do so under common law, articles of association and the Companies Act.
- e) A declaration that the defendants jointly or severally are liable to account to the estate for such sums as this Honourable Court may deem fit and just and that the said sum or sums be accordingly ordered to be paid to the estate.
- f) An order that all past and present dividends due and owing to the estate be paid, together with interest at 10% per annum.
- g) Damages for breach of fiduciary duty in the sum of \$12, 000, 000-00 (Twelve Million Dollars).
- h) Costs on the solicitor/client basis and such further other relief this Honourable Court may think fit, just and expedient.

25. In the first amended statement of claim of 06 December 2016 the Plaintiff claimed the defendants owed fiduciary duties to the plaintiff and there was a breach of the duty.

Plaintiff seeks from the First and/or Second Defendants jointly and severally the following relief:-

- a) An account of profits of the Relationships;
- b) Damages for such sum as is determined as a result of an account of profits;
- c) Appointment of an accountant approved by the Court to carry out the accounting;
- d) A declaration that the plaintiff as the Administratrix of the estate is entitled to seek and have access to all the records of the Second Defendant company in the same manner in which a shareholder is permitted to do so under common law, articles of association and the Companies Act;
- e) A declaration that the Defendants jointly or severally are liable to account to the estate for such sum as this Honourable Court may deem fit and just and that the said sum or sums be accordingly ordered to be paid to the estate;
- f) Interest at the commercial lending rate, whether or not the same be compounded, on all the sums found to be due to it, pursuant to the Court's equitable jurisdiction and/or under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) from the time the sums became due and payable;
- g) Costs on the solicitor/ clients basis and such further other relief this Honourable Court may think fit, just and expedient;

- h) And such further and other orders and reliefs as this Honorable Court may deem just and equitable in the circumstance of this case.

Or in the alternative

- i) Damages in the sum of FJD\$12 million;
- j) Interest at the commercial lending rate, whether or not the same be compounded, on all the sums found to be due to it, pursuant to the Court's equitable jurisdiction and/or under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) from the time the sums became due and payable;
- k) Costs on the solicitor/client basis and such further other relief this Honourable Court may think fit, just and expedient;
- l) And such further and other orders and reliefs as this Honourable Court may deem just and equitable in the circumstance of this case.

And for further or alternative claim the Plaintiff seeks from the First and/or Second Defendants jointly and severally the following relief:-

- a) Damages in the sum of \$1 million dollars.
- b) Costs on the solicitor/client basis and such further other relief this Honourable Court may think fit, just and expedient;
- c) And such further and other orders and reliefs as this Honourable Court may deem just and equitable in the circumstance of this case.

Alternatively seeks:

- a) Damages in the sum of £1796/12/9 (which is equivalent to FJD\$4,859.07 in today's rate);
- b) Interest at the commercial lending rate, whether or not the same be compounded, on all the sums found to be due to it, pursuant to the Court's equitable jurisdiction and/or under the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) from the time the sums became due and payable;
- c) Costs on the solicitor/client basis and such further other relief this Honourable Court may think fit, just and expedient;
- d) And such further and other orders and reliefs as this Honourable Court may deem just and equitable in the circumstance of this case.

26. In her second amended statement of claim against the Plaintiff claimed the defendants' owed fiduciary duties to the Plaintiff and there was breach of the duty.

Relief sought are:

- a) Wherefore the Plaintiff seeks from the First and/or Second Defendants jointly and severally the following relief:-
- b) An account of profits of the Relationships;
- c) Damages for such sum as is determined as a result of an account of profits;

- d) Appointment of an accountant approved by the Court to carry out the accounting;
- e) A declaration that the Plaintiff as the Administratrix of the Estate of the Plaintiff's said deceased husband, namely, Shiu Narayan Reddy is entitled to seek and have access to all the records of the Second Defendant company in the same manner in which a shareholder is permitted to do so under common law, articles of association and the Companies Act;
- f) A declaration that the Defendants jointly or severally are liable to account to the Estate for such sum as this Honourable Court may deem fit and just and that the said sum or sums be accordingly ordered to be paid to the Estate;
- g) Interest at the commercial lending rate, whether or not the same be compounded, on all the sums found to be due to it, pursuant to the Court's equitable jurisdiction and/or under the Law including the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) from the time the sums became due and payable;
- h) Costs on the solicitor/client basis and such further other relief this Honourable Court may think fit, just and expedient;
- i) And such further and other orders and reliefs as this Honourable Court may deem just and equitable in the circumstance of this case.

Or in the alternative

- m) Damages in the sum of FJD\$12 million;
- n) Interest at the commercial lending rate, whether or not the same be compounded, on all the sums found to be due to it, pursuant to the Court's equitable jurisdiction and/or under the Law including the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) from the time the sums became due and payable;
- o) Costs on the solicitor/client basis and such further other relief this Honourable Court may think fit, just and expedient;
- p) And such further and other orders and reliefs as this Honourable Court may deem just and equitable in the circumstance of this case.

And for further or alternative claim relief the Plaintiff seeks from the First and/or Second Defendants jointly and severally the following relief:-

- a) Damages in the sum of \$1 million dollars.
- b) Costs on the solicitor/client basis and such further other relief this Honourable Court may think fit, just and expedient;
- c) And such further and other orders and reliefs as this Honourable Court may deem just and equitable in the circumstance of this case.

Alternatively

- a) Damages in the sum of £1796/12/9 (which is equivalent to FJ\$4, 859.07 in today's rate);
- b) Interest at the commercial lending rate, whether or not the same be compounded, on all the sums found to be due to it, pursuant to the Court's equitable jurisdiction and/or under the Law including the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) from the time the sums became due and payable;
- c) Costs on the solicitor/client basis and such further other relief this Honourable Court may think fit, just and expedient;
- d) And such further and other orders and reliefs as this Honourable Court may deem just and equitable in the circumstance of this case.

27. In the proposed third amendment the plaintiff alleges the defendants are in breach of their obligation to Shiu & the plaintiff and alleging fraud committed by the defendants and specifically claim that the claim of the estate by the plaintiff is unaffected by limitation of action because of fraud.

Relief sought are:

- a. An account by the First Defendant and/or the Second Defendant for all of the legal structuring, profits and loss and balance-sheet of the Family Business since 1958;
- b. Payment to the Estate of their income one quarter share;
- c. Compensation for having been disposed of the house at 50 Nayau Street, Samabula, Suva;
- d. Return of the:
 - i. Return of the equivalent of FJDS4, 859.07 in pounds sterling in or about 1958 provided to the Family Business;
 - ii. Thirty (30) gold coins received as a dowry when the Plaintiff married Shiu in 1950; and
 - iii. (subject to paragraph 31(b) hereof) interests of Shiu and his family in and to the Family Business, as it operated from 1947 to 1962, when set over to the Second Defendant under the control of First Defendant upon incorporation without any payment to Shiu or his family.

28. I cannot but agree with the submission by the defendants' counsel that this application for amendment is to bypass the restriction placed by the limitation Act.
29. The matters that the plaintiff pleads in the proposed third amended statement of claim were available at the filing of the initial claim and subsequent two amendments.
30. The plaintiff has not shown to the court that there were materials not available to her till after the last amendment.

31. Now by pleading fraud the plaintiff intention is to defeat the limitation defence by the defendants.
32. Upon perusing the initial claim and subsequent amendments with the proposed amendment it is evident that the plaintiff is not confident what proper cause of action (if any) they have against the defendants.
33. Accordingly I find the application is mala fide for an ulterior purpose and hence dismiss the same.


Defendant's Application for Striking Out

34. The grounds for Defendant's application are:

- a) That the Statement of Claim is prolix and has been drawn up in a manner that may prejudice, embarrass or delay the fair trial of this action;
- b) That the Plaintiff is barred by laches from maintaining any claim against the Defendants on the facts alleged in the Second Amended Statement of Claim dated 10 May 2017;
- c) That in so far as any claims of the Plaintiff are grounded in contract or tort and arose from causes of action which were complete at a time in excess of six years prior to the commencement of these proceedings, these proceedings are barred *in limine* under Section 4 of the **Limitation Act**;
- d) That in so far as any claims of the Plaintiff are for an account in respect of matters in which arose more than six years prior to the commencement of these proceedings, these proceedings are barred *in limine* under Section 4 of the Limitation Act;
- e) That in so far as any claims of the Plaintiff are claims by a beneficiary or in respect of a breach of trust and the right of action accrued in excess of six years prior to the commencement of these proceedings, these proceedings are barred *in limine* under Section 9 of the Limitation Act;
- f) That in so far as any claims of the Plaintiff are claims to recover any part of the personal estate of a deceased person where the right to recover that property arose in excess of twelve years prior to the commencement of these proceedings, these proceedings are barred *in limine* under Section 10 of the Limitation Act; and
- g) That the action is an abuse of the process of the Court.

35. The Plaintiff is seeking for accounts of profits of the relationship and damages with other orders. Said claim is statute barred under section 4(1) (d) (i) and (2) of the Limitation Act.
36. The claim is that the first defendant was included into the partnership/joint venture in 1957 and this is when the deceased Shiu Narayan was informed he would not be formal part of the venture but is entitled to financial resources and that his financial interest and investment was secured and will continue to grow.
37. The investment of £1796/12/9 claimed to be recorded in the books of account in 1962 as investment by the deceased.
38. It was during the deceased's lifetime that the deceased asked for his shares in the venture and the defendants are alleged to have failed and neglected to provide the deceased with full and proper accounts [paragraph 3.3 of the second amended statement of claim].
39. Even the plaintiff's children are said to have requested the deceased to take action against the defendants [paragraph 3.4].
40. The deceased died in 1999. The plaintiff did not institute legal proceedings until 2014.
41. It is evident that the deceased and the plaintiff were aware of the alleged breaches since 1970s and even at the time of the death of the deceased in 1999.
42. "A plaintiff "may not stand by and permit the defendant to make profits and then claim entitlement to those profits" – *Warman International Ltd v Dwyer* @ 559; *Re Jarvis (decd)*; *Edge v Jarvis* [1958] 2 ALL ER 336 @ 341, citing *Clegg v Edmonson* [1857] Eng R 375; (1857) 8 De GM & G 787 @ 814" – *Crawley v Shourt* [2009] NSWCA 410 (6 December 2009).
43. My findings are that the plaintiff is barred by laches and hence the application by the defendants shall succeed.
44. The action shall be struck out and dismissed accordingly. There shall be cost awarded to the defendants summarily assessed at \$1,000 and to be paid by the Plaintiff in 14 days.





Vandhana Lal [Ms]
 Acting Master
 At Suva.