



## FACTS

2. Plaintiff filed action against first Defendant for alleged damage to the vehicles imported by them through Clinker dust.
3. According to said statement of claim filed on 12.9.2017 twenty eight of vehicles that were imported for resale got damaged due to Clinker dust incurring additional burden to Plaintiff's business.
4. This matter was fixed for hearing and on the day of hearing counsel for Plaintiff withdrew and accordingly hearing was postponed subject to cost.
5. Present solicitors for Plaintiff filed this application seeking joinder of new party, namely Carpenters Shipping, as the customs agent for the said vehicles.
6. According to proposed cause of action it is alleged that first Defendant did not take care of the said vehicles that were imported for resale. Plaintiff alleges that they were stored close to cement hopper which discharge Clinker to surrounding when it is being used to unload Clinker from a ship.
7. According to proposed statement of claim against second Defendant is based on they being the customs agents and their failure to act as owners of the goods in terms of Section 153 of Customs Act 1986.

## ANALYSIS

8. As regards to the first Defendant the cause of action in the statement of claim is for negligence and paragraph 16 of the statement of claim states the particulars of the negligence as:
  - a. *Failing to contain the cement Clinker (sic) which is hazardous substance to the environment.*
  - b. *Failing to ensure that it was handled and transported in a method that does not cause dust.*
  - c. *Failing to show due care and attention to other people's property within close proximity to the cement clinker (sic) that was under their care"*
- d. Particulars of the negligence in terms of paragraph 8 of the proposed statement of claim are:

*"a. Storing the vehicles in the first Defendant's storage yard next to or near to the cement hopper which contained cement powder inclusive of clinker and as a*

*result of which the dust containing clinker settled on the Plaintiff's vehicle(sic) causing stains to the vehicles.*

- b. The first Defendant should have known that the dust containing clinker could cause stains on the vehicles thereby causing damage to the Plaintiffs vehicles.*
- c. First Defendant failing to take care and park the Plaintiffs vehicles at a safer and further away from the hopper machine which released clinker."*

9. In comparison proposed particulars of negligence more clearly demonstrate the alleged tort to parties to this action from first Defendant.
10. Though the particulars in the statement of claim and proposed statement of claim are not identical both relate to cause of action based on negligence of the first Defendant taking care in storing Plaintiff's vehicles so as to get damaged from clinker dust which is a hazardous material.
11. So the cause of action against first Defendant is negligence in proposed statement of claim as well as in the pleadings is the negligence.
12. In the paragraph 14 of the proposed statement of claim Section 30 of Sea Ports Management Act 2005 is pleaded. This is not a separate cause of action but rather specific recognition of common law remedy that had included further requirement for a claim against them. This legal provision being mentioned in the statement of claim did not cause any prejudice to first Defendant.
13. So the objections of the first Defendant, except additional cost due to belated amendment, rejected.
14. Objections were raised in the written submission and for that my findings in brief are as follows:
  - a. There cannot be objection to the statement of claim being fully amended specially when a new party is added*
  - b. The clause of action against first Plaintiff remained negligence and more particulars are given with some addition as to legal provisions regarding the damage.*
  - c. There is delay in this action due to Plaintiff's amendment which can be addressed through a payment of cost*
  - d. There is no evidence that amendments were done in bad faith.*
  - e. The proposed amendment clarify the issues of the matter*
  - f. There is no new cause of action as cause of action remained negligence due to manner in which vehicles were stored before clearance.*



g. *There is no restriction as to particulars of claim as long as amendments explain the cause of action fully.*

15. So there is no basis for the objection to the amendment other than delay, which can be addressed through payment of cost. First Defendant had proceeded to hearing and with the amendment he needs to incur additional costs to engage solicitors for the preparation of pleadings and other pre trial issues. Considering the time and nature of claim in my judgment a cost of \$4,000 would be sufficient to compensate prejudice to them from delay.
16. Cause of action against second Defendant is based on deeming provision of Section 153 of Customs Act 1986. This recognizes proposed second Defendant as the owner of the vehicles imported and imposes some liabilities on them in regard to the imported vehicles that were stored in port before clearance by customs.
17. In order to join a party Plaintiff needs to fulfill the requirement contained in Order 15 rule 4 of the High Court Rules 1988. Accordingly Plaintiff needs to establish;
  - a. Some common law or facts apply to the cause of action of the party proposed to be joined.
  - b. All rights to claim arose from same transaction or series of transaction.
18. Supreme Court Practice (White Book) 1988 p 175 15/4/7 states:

*'Similarly, wher the plaintiff is in reasonable doubt as to the person from whom he is entitled to redress, he may join two or more defendants in one action and make his claim against them severally, or in the alternative....'*
19. There is common law and facts applying to both parties to this action as the claim is regarding alleged damage to clinker before the said vehicles were released from ports by customs agent. In the circumstances the objections of the second Defendant are not based on the said Order of High Court Rules of 1988.
20. Defendant also state that there is still money owed to them by Plaintiff as regards to clearance of the said vehicles as their customs agents.
21. The debt of the parties due to they acting as customs agents is not part of cause of action here. It was a different issue and if the debt is already admitted through written acknowledgment it must be honoured, but such acknowledgment of debt will not absolve a party from suing for negligence under tort. Payment of debt cannot be held due to this action.

## CONCLUSION


22. Objections raised to this application for joinder and amendment have no merits except for the delay, which can be compensated through cost. This is assessed as \$4,000 to be paid within 28 days to proposed first Defendant. Subject to that summons for joinder and amendment is allowed. Parties to bear their costs for this application.

## FINAL ORDERS

- a. Summons for joinder and amendment is allowed subject to payment of cost of \$4000 to the first Defendant.
- b. Cost to be paid within 28 days.
- c. Plaintiff to file and serve amended statement of claim within 28 days and Defendants to file and serve statements of defence 14 days after service of the amended statement of claim.
- d. The matter is listed for mention on 4.5.2020 for directions.
- e. Cost of this application for amendment to be borne by the parties.

Dated at Suva this 2<sup>nd</sup> day of April, 2020.



  
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Justice Deepthi Amaratunga  
High Court, Suva