

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

CIVIL ACTION NO.: HBC 17 of 2013

**BETWEEN : ADRENALIN (FIJI) PROPRIETARY LIMITED
PLAINTIFF**

**AND : DENARAU INVESTMENTS LIMITED
DEFENDANT**

APPEARANCES/REPRESENTATION

PLAINTIFF : Ms S Saumatua [Vama Law]

DEFENDANT : Mr V Singh [Parshotam Lawyers]

RULING BY : Acting Master Ms Vandhana Lal

DELIVERED ON : 18 June 2020

RULING

The Application

1. The Plaintiff wishes to amend its Statement of Claim pursuant to Order 20 rule 5(1) of the High Court Rules. It has filed an Affidavit of one Lowata Vulase in support of the application.
2. The Defendant who is opposing the application filed its Affidavit on 2nd November 2017.
3. The Plaintiff filed a reply on 13th November 2017.

The Substantive Claim

4. A summary of the claim as outlined by Master Bull in her judgment of 25th May 2018 is as follows:

25. *The Plaintiff's statement of claim pleads that it had entered into 4 separate agreements with the Defendant, for the latter to, inter alia, construct 4 villas, and sell to the Plaintiff fittings, furnishings, and equipment for each of the villas.*
26. *Each of the agreements contained a clause 3.1 (b) which required the Plaintiff to pay to Minter Ellison Rudd Watts (the Third Party), a stakeholder nominated exclusively to that role by the Defendant, a deposit of 10% of the sale price. The Plaintiff claims that the Third Party maintained a special relationship with the Defendant either directly or indirectly through the Defendant's Fiji and New Zealand solicitors and that at all times, the Defendant was in a position to control, influence, and or affect the decisions of the Third Party especially in relation to deposits and interests earned thereon.*
27. *Owing to the failure of the Defendant to complete construction of the villas as agreed, the parties executed a Deed of Settlement on 3rd September 2012, agreeing inter alia to the cancellation of the Agreements, and to the refund of the Deposits and Net Interests. However, the Third Party wrongfully deducted the New Zealand withholding tax despite the Plaintiff advising both the Third Party and the Defendant about the correct percentage to be deducted. The Third Party also deducted commission from funds that it held as a stakeholder without being entitled to this commission. There is also a claim for costs arising out of a Settlement Deed in earlier Court proceedings in the Lautoka High Court.*
28. *The Plaintiff claims that the Defendant is liable for the Third Party's actions because the Defendant was in a special relationship with the Third Party.*

Plaintiff's Contention

5. The Plaintiff states that it needs to amend its Statement of Claim for following reasons.

The amendment sought succinctly describes the Plaintiff's Claim and does not in any way change the basis of the claim.

The First and Second cause of actions remains the same. The amendment is done to clarify the claim for the Defendant to know exactly the nature of the claim.

The Plaintiff is including an additional cause of action which is failure to provide New Zealand Tax Certificates under the Double Tax Agreement with Fiji.

This cause of action arises out of the same facts and hence is not a new issue for the Defendant.

Whilst gathering its evidence and documentation the Plaintiff realized there were material facts that needed to be added to the claim.

Defendant's Argument

6. According to the Defendant, the original claim by the Plaintiff is 43 paragraphs and 8 pages long. Extensive time was spent by the Defendant and its Solicitors in putting together a Statement of Defendant with substantial cost being incurred.

The amendment the Plaintiff intends to make is already before the court and there no need for an amendment.

The new claim by the Plaintiff is an issue with Minter Ellison Rudd Watts and not the Defendant.

The tax certificates would show all the information regarding the calculation of interest. The difference between the interest paid and the interest that the Plaintiff claims should have been paid is already claimed as the Plaintiff's 1st cause of action. There is no basis for the claim of NZD \$20,394.14 against the Defendant and no explanation on how this sum is arrived at.

The Tax Certificates relates to period 2004 to 2011 and the alleged failure to provide the Certificate is after the expiry of the limitation period.

Plaintiff's Reply

7. In reply the Plaintiff stated the documents it will rely on the 3rd cause of action is same as that for the 1st cause of action and has already been listed for discovery. There will be no need for additional discovery. The new claim is not an entirely new claim which has been raised before.

It has realized that they omitted to include the proposal additional cause of action [failure to provide New Zealand Tax Certificates under the Double Tax Agreement].

The application for amendment is made as soon as it realized the omission.

It had through its previous counsel sought from the Defendant's Solicitors and later from Minter Ellison Rudd Watts for information in March 2012. It never obtained any information from either the Defendant or Minter Ellison Rudd Watts.

In 2012, the Plaintiff was advised by the New Zealand Tax Department that the Defendant would have been issued annually with the Tax Certificates.

Pursuant to the Sale and Purchase Agreement, the Defendant was responsible to pay tax and would have been ultimately been the recipient of the Tax Certificates.

Minter Ellison Rudd Watts is not obliged to give the Tax Certificate to a third party except to the Tax payer [that is the Defendant in this case].

With the Sale and Purchase Agreement cancelled in 2009, the Tax Certificates should have been returned back to the Plaintiff in 2012 when a Deed of Settlement was signed.

There is a substantial difference between the first cause of action and the third.

The first cause of action is for the difference between what taxes should have been paid and what taxes were actually paid.

Whereas the third cause of action is for loss of opportunity and/or option to claim the taxes paid in New Zealand under the Double Tax Agreement in Fiji.

A sum of N\$20,394.14 was arrived at by calculating the 10% (NRWT rate) of the tax that should been paid in New Zealand which the Plaintiff claims it should have had the option to claim in Fiji under the Double Tax Agreement. According to the Plaintiff, they lost this option and opportunity as they were never given the Tax Certificates by the Defendant.

The cause of action accrued in September 2012 after the parties executed the Deed of Settlement. Prior to this the Plaintiff did not have a cause of action against the Defendant.

The additional cause of action arises out of the facts as in the first cause of action.

Hence since there will be no additional evidence submitted thus it is not prejudicial to the Defendant if an amendment is allowed.

Law

8. Order 20 rule 5 of the High Court Rules gives the court a general power to allow amendments “*to allow determination of the real question in controversy between the parties or to correct any defect or error without doing injustice to the other party.*” – paragraphs 20/5-8/6, Explanatory note to Order 20 rule 5 of the Supreme Court Practice Vol 1, 1993ed.
9. “*However negligent or careless may have been to first omission, and however late the propose 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 cost*”:- per Brett M. R. in **Clarapede v Commercial Union Association (1883) 32 WR. 262 at page 263.**
10. Under Order 20 rule 5(5) of the High OCurt Rules, if the proceedings had been from the beginning properly formulated or constituted in the circumstances specified paras (3), (4) and (5) the defence of limitation could not have been available to the Defendant; and accordingly, if in its discretion, the court thinks it just to grant leave to amend defects in the Writ or pleading within the scope of the circumstances specified in these paras, so that such defects in the proceedings are treated as having been cured ab initio, the Defendant is not being deprived of the benefit of a defence which he would not have had if the proceedings had been so properly formulated or constituted in the first place. [Explanatory notes on Para 20/5 – 8/7 of the Supreme Court Practice Vol 1 1993 ed].

Determination

11. The Plaintiff alleges that the Defendant in August 2009 had failed, refused, was unwilling and/or was unable to complete construction of the respective villas pursuant to respective agreements entered into in 2014.

12. After obtaining a default judgment on 29th February 2012, the Plaintiff and the Defendant on 3rd September 2012 executed a Settlement Deed whereby both parties agreed inter alia to the cancellation of the Agreements and refund the Deposit and Net Interest.
13. Minter Ellison Rudd Watts paid the Plaintiff NZD\$531, 649.12 made up of:
 - i. NZD \$414,980 as refund of the deposits; and
 - ii. NZD \$116, 669.12 as refund of Net Interest.
14. According to the Plaintiff, Net Interest as defined in clause 1 of the agreement is:

“All interest (if any) accruing on each Deposit, and any net interest accruing on any deposit paid by the Purchaser for the Villa under the Scheme transferred to the Stakeholder as required under the Transfer of Deposit Money section of Schedule 1, at the interest rate applicable from time to time in respect of the relevant Stakeholder Account in which the Deposit is held, less Denarau Investments’ withholding tax, bank and Stakeholder handling charges, and all other withholding tax, levies and other governmental charges which may accrue.”
15. The first cause of action is for negligent – overpayment and deduction of withholding tax.
16. The second cause of action for negligent – failure to prevent deduction of commission by Minter Ellison Rudd Watts.
17. The third cause of action is for claim under the settlement deed.

The Proposed Amendments

18. Upon perusal of the proposed amended statement of claim paragraph 3-15 of the statement of claim is amended. However the gist of the claim relates to the four agreements entered on 20th October 2004 and the four deed of settlements entered on 3rd September 2012 whereby, parties agreed amongst other things to:

- i. A refund of the deposits and Net Interest part thereof to the Plaintiff; and
 - ii. The Plaintiff's right to claim the discrepancies arising from the termination of the agreement.

19. There are amendments done to the facts outlined for the causes of action. However they remain basically the same except for inclusion of a new third cause of action which is negligence by Defendant – Failure to provide New Zealand Tax Certificates under DTA with Fiji.

20. Upon perusal of the same I find it does arise from the same facts as pleaded in the current Statement of Claim and relates to the first cause of action.

21. The matter is at pre-trial conference stage and the Defendant I find can be compensated with cost for the delay being caused due to the amendments.

22. Considering the above I find it just to allow the Plaintiff to amend its Statement of Claim.

Final Orders.

23. The Plaintiff is granted leave to amend its Statement of Claim and file its amended Statement of Claim in the form as annexed to Affidavit in Support of the application and marked as annexure "A".

24. The Plaintiff is to file and serve its amended Statement of Claim on or before 4pm on 02 July 2020.

25. The Defendant is to file and serve its Statement of Defence to the amended claim on or before 4pm on 16 July 2020.

26. Plaintiff to file and serve its reply to the Statement of Defence on or before 4pm 23 July 2020.

27. The Plaintiff is to pay cost to the Defendant summarily assessed at \$1,500. Said cost to be paid on or before 4pm on 02 July 2020.



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Vandhana Lal [Ms]
Acting Master
At Suva.