

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

**Civil Action No. HBC 94 of 2006**

**BETWEEN**            **ALI'S CIVIL ENGINEERING LIMITED** a limited liability company having its registered office at Labasa and carrying on business in Suva and elsewhere.

**First Plaintiff**

**A N D**                **VITIANA TIMBERS (FIJI) LIMITED** a limited liability company having its registered office at Labasa and carrying on business in Suva and elsewhere.

**Second Plaintiff**

**A N D**                **HABIB BANK LIMITED** a banking body duly incorporated under the laws of the Companies Act 1913 having its registered office at Habib Bank Plaza 1.1 Chandigar Road, Karachi and carrying on the business of banking in Fiji and elsewhere.

**First Defendant**

**A N D**                **CHALLENGE ENGINEERING LIMITED** a limited liability company having its registered office at Suva.

**Second Defendant**

**A N D**                **NATIONAL BANK OF FIJI** trading as **COLONIAL NATIONAL BANK** having its registered office at Suva.

**Third Defendant**

**A N D**                **DIRECTOR OF LANDS AND SURVEYOR GENERAL**

**Fourth Defendant**

**A N D**                **REGISTRAR OF TITLES**

**Fifth Defendant**

**A N D**                **ATTORNEY GENERAL**

**Sixth Defendant**

Appearance:        Mr. Chen Young with Mr. Varunendra Prasad for the plaintiffs.  
Ms. Mary Motofaga for the 4<sup>th</sup> – 6<sup>th</sup> defendants.

Hearing:             Wednesday, 3<sup>rd</sup> August, 2022 at 9.30am.

Decision:            Tuesday, 27<sup>th</sup> September, 2022 at 9.00am.

## DECISION

### [A] INTRODUCTION

- [1]. This is an application by the plaintiffs for leave to amend their *“Third Amended Statement of Claim”*.
- [2]. The first, second and third defendants have all agreed to the proposed Fourth Amended Statement of Claim, and only the 4<sup>th</sup> - 6<sup>th</sup> defendants are opposing.
- [3]. The plaintiffs seek leave to amend the Third Amended Statement of Claim by adding a paragraph [No. (65)] raising a cause of action of breach of statutory duty or common law negligence. Paragraph (65) alleges that:

(65) *“ On 8 June 2004 the Fourth Defendant acting in breach of his statutory duty or negligently granted consent to the forged and fraudulent mortgage without insisting on the first plaintiff to sign the application or sighting the written authorization of Shazran Lateef to sign on behalf of the first plaintiff or checking the accuracy of the information contained in the application.*

The plaintiffs pray:

- (17) *“General damages against the fourth defendant for breach of statutory duty or negligence in granting consent to the first defendant:*
- (a) *For the fraudulent mortgage 8645; and*
- (b) *For the sale pursuant to the fraudulent mortgage 8645.*

- [4]. The fourth defendant opposes the proposed amendment on the following grounds: [Verbatim]
- a). *The cause of action of negligence and/or breach of statutory duty does not arise from facts which are the same as or include or form part of facts giving rise to the cause of action of fraud (forgery and misrepresentation) against the first defendant.*

- b). *The proposed amendment is not necessary for the purpose of determining the real questions in controversy between the parties; and*
- c). *Prejudice.*

[B] **THE PRINCIPLES GOVERNING LEAVE TO AMEND**

- [5]. It is necessary to turn to the applicable law and judicial thinking in relation to the principles governing the exercise of the discretion to make the Order the plaintiffs now seek.
- [6]. Rather than refer in detail to the various authorities, I propose to set out, with only important citations, what I take to be the principles remain in play.
- [7]. This is **primarily** the plaintiffs' application to amend its Third Amended Writ and the Statement of Claim pursuant to **Order 20, Rule 5 of the High Court Rules, 1988**. The law relating to grant of leave to amend pleadings is set out under **Order 20, rule 5 of the High Court Rules, 1988**.

**Order 20, Rule 5, of the High Court Rules provides:**

*"5-(1) Subject to Order 15, Rule 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."*

- [8]. **Under Order 20/8/6 of the Supreme Court Practice of 1999** under the heading '**General principles for grant of leave to amend**' at page 379 it is stated that:

*"General principles for grant of leave to amend (rr5, 7 and 8)-It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made **"for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defects or errors in any proceedings."** (See per Jenkins L. J. in R. L. Baker Ltd v Medway Building & supplies Ltd[1958] 1 W.L.R. 1216; [1958] 3 All E.R. 540. P. 546)."*

(Emphasis added)

*It is a well-established principle that the object of the court is to decide rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace. It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right” (per Bowen L.J. in Cropper v. Smith (1883) 26 Ch. D. 700, pp. 710 – 711, with which observations A.L. Smith L.J., expressed “emphatic agreement” in Shoe Machinery Co. v. Cultam (1896) 1 Ch. 108. P. 112).”*

- [9]. **Under Order 20/8/6 of the Supreme Court Practice of 1999** under the heading ‘**General principles for grant of leave to amend**’ at page 379 further stated as follows:

“In **Tildesley v. Harper** (1878) 10 Ch. D. 393, pp. 396, 397, Bramwell L.J. said:

*“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by this blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.” “However negligent or careless may have been the first omission, and however late the proposed 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 costs” (per Brett M.R. Clarapede v. Commercial Union Association (1883) 32 WR 262, p263; Weldon v. Neal (1887) 19 QBD 394 p.396. Australian Steam Navigation Co. v. Smith (1889) 14 App. Cas. 318 p 320; Hunt v. Rice & Sons (1837) 53 TLR 931, C.A and see the remarks of Lindley L.J. Indigo Co. v. Ogilvy(1891) 2 Ch. 39; and of Pollock B. Steward v. North Metropolitan Tramways Co. (1886) 16 QBD.178, P. 180, and per Esher M.R. p.558, c.a.).An amendment ought to be allowed if thereby “the real substantial question can be raised between the parties,” and multiplicity of legal proceedings avoided (Kurtz v. Spence (1888) 36 Ch, D. 774; The Alert (1895) 72 L.T. 124).*

*On the other hand it should be remembered that there is a clear difference between allowing amendments to clarify the **issues in dispute and those that provide a distinct defence or claim to be raised for the first time** (see, per Lord Griffiths in Kettma v Hansel Properties Ltd [1987] A.C. 189 at 220).*

*Leave to amend will be given to enable the defendant to raise a defence arising from a change in the law since the commencement of the proceedings affecting the rights of the parties or the relief or remedy claimed by the plaintiff, even though this might lead to additional delay and expense and a much longer trial, e.g. that the plaintiffs have acted in contravention of Art. 85 (alleging undue restriction of competition) and Article 86 (alleging abuse of dominant market position) of the treaty establishing the European Economic Community (the "Treaty of Rome") which became part of the law of the United Kingdom by the European Communities Act 1972, so as to become disentitled to their claim for an injunction (Application des Gaz SA v Falks VeritasLtd [1974] Ch. 381; [1974]3 All E.R. 51 CA). In a copyright action, leave may be given to amend the statement of claim to include allegations of similar fact evidence of the defendant having copied the products of other persons (Perrin v Drennan[1991] F.S.R. 81).*

*Where a proposed amendment is founded upon material obtained on discovery from the defendant and the plaintiff also intends to use it for some purpose ulterior to the pursuit of the action (e.g. to provide such information to third parties so that they could bring an action), **the plaintiff should not be allowed to amend a statement of claim** endorsed on the writ and so it the public domain but instead the amendment should be made as a statement of claim separate from the writ and thus not available for public inspection (Mialano Assicurazione Spa v Walbrook Insurance Co Ltd [1994] 1 W.L.R 977 see too Omar v Omar [1995] 1 W.L.R. 1428,) use of documents disclosed in relation to Mareva relief permitted to amend claim and at trial.*

*The Court is entitled to have regard to the merits of the case in an application to amend if the merits are readily apparent and are so apparent without prolonged investigation into the merits of the case (King's Quality Ltd v A.J. Paints Ltd [1997] 3 All E.R. 267)."*

- [10]. Hon. Madam Justice D. Wickramasinghe stated in **Colonial National Bank v Naicker**<sup>1</sup> by direct reference to the Supreme Court Practice 1988 (White Book) as set out under Order 20/5-8/6 as:

*“It is a guiding principle of cardinal importance on the question of amendment that generally speaking, all such amendments ought to be made” for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defects or error in any proceedings.” (see per Jenkins L.J. in R.L Baker Ltd v Medway Building &Supplies Ltd [1958] 1 W.L.P 1216, p 1231; [1958] 3 All E.R 540, p. 546).”*

Hon. Justice Pathik in **Rokobau v Marine Pacific Ltd**<sup>2</sup> said:

*“We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.”*

- [11]. Lord Keith of Kinkel in **Ketteman and others v Hansel Properties Ltd**<sup>3</sup> observed that;

*“Whether or not a proposed amendment should be allowed is a matter within the discretion of the judge dealing with the application, but the discretion is one that falls to be exercised in accordance with well-settled principles. In his interlocutory judgment of 10 December 1982, allowing the proposed amendment, Judge Hayman set out and quoted at some length from the classical authorities on this topic. 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*

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<sup>1</sup> [2011] FJHC 250; HBC 294. 2003 (6 May 2011)

<sup>2</sup> Hbc0503d.93s

<sup>3</sup> (1988) 1 All ER 38

compensated by an award of costs. In *Clarapade & Co v Commercial Union* (1883) 32 WR 262 a 263 Brett MR said:

*The rule of conduct of the court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed 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: but if the amendment will put them into such a position that they must be injured it ought not to be made”.*

[12]. **LORD KEITH OF KINKEL** in **KETTEMAN v HANSEL PROPERTIES** (*supra*) states further that;

*“The effect of these authorities can, I think, be summarised in the following four propositions. First, all such amendments should be made as a necessary to enable the real questions in controversy between the parties to be decided.*

*Secondly, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party’s failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate orders as to costs.”*

Speight J. in **Reddy Construction Company Ltd v Pacific Gas Company Limited**<sup>4</sup>;

*“The primary rule is that leave may be granted at any time to amend on terms if it can be done without prejudice to the other side.”*

## [C] **CONSIDERATION**

[13]. Counsel for the plaintiffs say: [Verbatim]

i). *The proposed Fourth Amended Statement of Claim sets out the facts and the reliefs or remedies claimed in the Third Amended Statement of Claim*

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<sup>4</sup> (1980) 26 FLR 121 held

*in a more simple and straight forward way and clearly identifies the real matter in controversy and the issues, for determination by the court.*

- ii). *Neither the addition to paragraph (65) nor prayer (17) adds a new cause of action.*
- iii). *But if it does, then the amendment should still be allowed because the new cause of action arises out of same facts or substantially the same facts in respect of which relief has already been claimed in the action by the plaintiffs'.*
- iv). *There will be no injustice to the fourth defendant if the amendment is allowed.*

[14]. As already noted, counsel for the fourth defendant opposed the plaintiffs' application for amendment, saying:

- a). *The cause of action of negligence and/or breach of statutory duty does not arise from facts which are the same as or include or form part of facts giving rise to the cause of action of fraud (forgery and misrepresentation) against the first defendant.*
- b). *The proposed amendment is not necessary for the purpose of determining the real questions in controversy between the parties; and*
- c). *Prejudice.*

[15]. Counsel for the plaintiffs relied on the following decisions:

- *Kettemen & Ors v Hansel Properties Ltd [1988] 1 ALL.E.R 38*
- *Cropper v Smith [1881] 26. Ch. D 700*
- *Smith v Wilkins and Davies Construction Company Ltd [1958] NZLR 958*
- *Dornan v J. W. Ellis & Co Ltd [1962] 1 ALL.E.R 303 [CA]*
- *WM Angus [Fiji] Ltd v Karan [2008] FJHC 165*

[16]. Counsel for the fourth defendant relied on the following decisions:

- *Peter Sujendra Sundar & Concave Investment Ltd v Chandrika Prasad [1998] FJCA 19*



- *Kettemen & Ors v Hansel Properties Ltd [1988] 1 ALL. E. R 38*

### **Introducing a new cause of action**

[17]. Counsel for the fourth defendant said that the proposed cause of action in negligence and/or breach of statutory duty relies on **new facts**. Counsel emphasized that a writ or pleading may be amended to add or substitute a new cause of action if the 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.

[18]. The plaintiffs' counsel responded [the following extracts are taken from page (10) and (11) of the written submissions filed on behalf of the plaintiffs]

18. *In particular, paragraphs 50-53 & 58 show that the Fourth Defendant gave consent to a forged and fraudulent mortgage on 5 June 2004 and the First Plaintiff suffered as a direct result of it because that allowed the First Defendant to register the forged and fraudulent mortgage with the Registrar of Deeds to and to eventually exercise the powers under it, with Fourth Defendant's further consent granted on 6 January 2006, to sell the First Plaintiff's property to the Second Defendant.*
19. *This is the nub of the Plaintiffs' claim against the Fourth Defendant, in that, the pleaded facts already give rise to the issues of negligence and breach of statutory duty without stating those labels because the Court would have to decide on the facts whether the Fourth Defendant had exercised reasonable care and skill or properly discharged its statutory duty in giving its consent to a forged and fraudulent mortgage.*
20. *The Plaintiffs have already claimed general damages in prayer (11) and Exemplary and Punitive Damages in prayer (12) against all the Defendants, and the Fourth Defendant would; have to pay damages to the Plaintiffs if it is found that he gave consent to a forged and fraudulent mortgage which resulted in loss to the First Plaintiff. Importantly, prayer (11) is an extension of prayer (3).*

21. *Therefore, the addition of paragraph 65 and prayer (17) in the proposed Fourth Amended Statement of Claim merely attaches legal terms to the basis of the claim for damages arising from the pleaded facts. The relevant facts have not changed.*

22. *In **Dornan v J.W. Ellis & Co. Ltd** [1962] 1 All ER 303 (C.A) Davies L J did not think that the amendment set up an entirely different case of negligence from the one which was first set up and said at 307 (E):*

*“The story that is now set up by the plaintiff is the same a story as that set up all along, .... What is now sought to be done is not to make out a new case of negligence, but to persist in the old story and invite the judge at the trial to approach it, to interpret it, from a different angle or aspect. It is a different approach to the same main story of the accident.”*

23. *Further, in this case, the original statement of claim was filed within the limitation period, and it included facts about the Fourth Defendant granting his consent to a forged and fraudulent mortgage which gave rise to a claim for damages against it.*

[19]. Turning to paragraph (41), (42) and (43) of the Third Amended Statement of Claim, it was the core part of the plaintiffs’ pleaded case that a fraud was committed by the first defendant by altering the original mortgage deed as follows: (Reference is made to paragraph (41), (42) and (43) of the Third Amended Statement of Claim).

41. *That in or about 8th June 2004 unbeknown to the First Plaintiff, the First Defendant itself by its servants and or agents and or its Solicitors fraudulently and without knowledge, consent or any authority of the First Plaintiff and in breach of Statutory law purported to vary the Original Mortgage No. 6993 by unilaterally fraudulently altering same by inserting thereon by different typing the following “now known as Lot 1 SO 4379 State Foreshore” under the margin ‘Description’ and adding further “now 2.2938 ha (estimated area)” under the margin “Area” (which additions are hereinafter referred to as “said fraudulent alterations”).*

### Particulars of fraudulent alterations

- a). *That the Original Mortgage stated land description of Lot 2 on Plan DSS1116 Laucala Beach Estate in the province of Naitasiri consisting of an area of 3500 square metres and not what had been added through unilateral fraudulent alteration by the First Defendant through its servants, agents and or solicitors.*
  - b). *That the First Defendant through its Servants and or Agents and or Solicitors unilaterally, fraudulently altered and added with different typing on the mortgage instrument Mortgage No. 6993 dated 3rd August 1999 "now known as Lot 1 SO 4379 State Foreshore" being Approval Notice of Lease dated 3rd April 2000.*
  - c). *That the First Defendant, itself through its Servants and or Agents and or Solicitors unilaterality altered and added Lot 1 SO 4379 being 2.2938 ha when the said land was not subject to any mortgage.*
  - d). *The Original Mortgage had initials of the Mortgagor in the margin where the property was described and the alterations were done to wrongly represent to the Director of Lands and the Registrar of Titles & Deeds that such alterations were concurrently initialed by the Mortgagor.*
42. *That the fraud was committed by the First Defendant through its servants, agents and or its Solicitors as follows:*
- i). *By making photocopy of the Original Mortgage No. 6993.*
  - ii). *The having the Original registration Number 6993 as registered with Registrar of Deeds and the signature of the Registrar of Deeds erased.*
  - iii). *Then unlawfully and illegally making the said fraudulent alterations on the photocopy of the Original Mortgage.*

- iv). *Then after carrying out the said fraudulent alterations as aforesaid, had the unlawfully altered Original Mortgage certified true copy by the First Defendant's Solicitor.*
  - v). *Then had the same again registered with the Registrar of Deeds on the 8th day of June, 2004 as Original Documents (and which unlawfully purported to vary Original Mortgage No. 6993 and as unlawfully registered as purported Mortgage No. 8465 dated 3rd August 1999 being the same date of Mortgage No. 6993 ('The altered fraudulent Mortgage')).*
  - vi). *To avoid detection the First Defendant and/or its Solicitors lodged the varied altered fraudulent Mortgage for registration with the Registrar of Deeds in the name of Tamara & Associates, Barristers and Solicitors.*
43. *Alternatively the fraudulent alteration of Mortgage No. 6993 was carried out by the First Defendant through its servants, agents and or its solicitors as follows:*
- (a) *the duplicate copy of the registered Mortgage No. 6993 at all material times was in the custody, possession and control of the first Defendant;*
  - (b) *the registered Mortgage No. 6993 was altered by writing whilst the duplicate was in the custody, possession and control of the First Defendant without any authority and consent of the Mortgagor:*
    - i). *By altering the description of the land from 'Lot 2 on Plan DSS 1116' to 'Lot 1 SO 4379';*
    - ii). *Its location of 'Laucala Beach Estate' has been altered to 'State Foreshore'; and*
    - iii). *The area has changed from 3500m<sup>2</sup> to 2.2938 hectares:*

(c) *the Original Mortgage had initials of the Mortgagor in the Margin where the property was described and the alterations were done to wrongly and falsely represent to the Director of Lands and the Registrar of Titles & Deeds that such alterations were concurrently initialed by the Mortgagor.*

(d) *the First Plaintiff pleads res ipsa loquitur for the First Defendant to Provide evidence of how this was fraudulently altered.*

[20]. On 04.06.2004, the altered mortgage deed was endorsed with the Director of Lands consent to a mortgage relating to a debt not exceeding \$1,250,000.00. The Registrar of Deeds Office had given the altered mortgage deed number 8465 and had recorded its registration on 08.06.2004.

[21]. The plaintiffs claim that the first defendant [the bank] did this alteration in order to support its assertion that Lot 1 (One) represented the true security for the debt, and that it was therefore entitled to realise its security by selling Lot 01 and not just Lot 02. On 06.01.2006, the fourth defendant granted consent to sell the plaintiffs' property to the second defendant. In due course, the first defendant [the bank] sold Lot 1 for FJD\$ 250,000.00 to the second defendant, Challenge Engineering Ltd.

[22]. Paragraph (51), (52) and (53) alleges that;

**Director of Lands' consent under Section 13 (1) Crown Lands procured by misrepresentation and deceit by the First Defendant.**

51. *After the Judgment of 5th February 2004 in Suva High Court in Civil Action No. HBC 35 of 2004, the First Defendant by itself and through its solicitors made various false and misleading representations to the Director of Lands in writing and during personal meetings, to the exclusion of the First Plaintiff, seeking to obtain a mortgage or purported variation of mortgage over Approval Notice of Lease dated 3<sup>rd</sup> April 2000 being for the Land known as Lot 1 on SO 4379 State Foreshore containing an area of 2.2938ha which lot of land the First Plaintiff had never given as security under any mortgage and which by Judgment dated 5<sup>th</sup> February 2004 the*

*Suva High Court had made clear was not a lot of land described on Mortgage No. 6993.*

52. *Subsequently the First Defendant sent the altered fraudulent mortgage to the Director of Lands for him to endorse his consent to the mortgage on it, and thereby the First Defendant was representing to the Director of Lands that the contents of the altered fraudulent mortgage (in particular the description of the security as Lot 1 on SO 4379) had been consented to by Ali's Civil Engineering Limited, the First Plaintiff.*

53. *The Application for Consent to a Mortgage dated 4 June 2004 was signed by solicitor for the First Defendant as solicitor for the First Plaintiff, as lessee and applicant when the First Plaintiff had never instructed or authorized the solicitor for the First Defendant to make such application having no knowledge whatsoever that such application was being made.*

[23]. In paragraph (56), (57) and (58) of the Third Amended Statement of Claim, the plaintiffs allege:

i). *The representations were made with the intention that it be acted upon by the Director of Lands by endorsing his consent to the second mortgage on the altered fraudulent mortgage.*

ii). *It was acted upon by the Director of Lands because he did indeed endorse his consent to the second mortgage on the altered fraudulent mortgage.*

iii). *As a direct consequence, the First Plaintiff has suffered damages and continues to suffer damages because the altered fraudulent mortgage was attempted to be used by the First Defendant to realise its purported security over Lot 1 on SO 4379 by purporting to sell it to Second Defendant.*

[24]. It is not difficult to understand the plaintiffs' causes of action against the first defendant on the basis of the facts pleaded in the Third Amended Statement of Claim. They are:

- i). Forgery by altering mortgage deed.
- ii). Making fraudulent representations to the fourth defendant [the Director of Lands].
- iii). Deceived the Director of Lands by: **Tort of Deceit**
  - a). Sending the altered mortgage deed to the Director of Lands for him to endorse his consent to the mortgage deed on it, the Bank (1D) was representing to the Director of Lands that; (i) the mortgage deed reflected the true nature of its security for its debt; (ii) the contents of the altered mortgage deed had been consented to by the plaintiffs' as it had been purportedly signed by at least one director of the plaintiffs.
  - b). The representation was false because the true nature of the security was not Lot 1 as the altered mortgage deed stated but Lot 2 and the bank knew that this representation was false because it knew that the true security for the debt was Lot 2.
  - c). That representation was false because the plaintiffs' had not consented to the alteration to the mortgage deed, and the bank (1D) knew that the plaintiffs had not consented to them because the bank had concealed them from the plaintiffs.
  - d). The false representation was made with the intention that it be acted upon by the Director of Lands by endorsing his consent to the second mortgage on the altered mortgage deed.
  - e). It was acted upon by the Director of Lands because he did indeed endorse his consent to the second mortgage on the altered mortgage deed; and
  - f). The plaintiffs' suffered damages because a plot of land, namely that part of Lot 1, which did not include Lot 2, was wrongly sold by the Bank (1D) to the second defendant, thus depriving the plaintiff of it.

[25]. It was **never the plaintiffs' case that:**

*“the fourth defendant receiving the altered mortgage deed from the first defendant had **no right** to rely on the first defendant’s representation for the accuracy of its contents.”*

[26]. Therefore, the alleged duty by statute or duty in tort never arose from the pleaded facts in the Third Amended Statement of Claim. The plaintiffs never asserted in the Third Amended Statement of Claim that the Director of Lands owed to plaintiffs; (A) a duty imposed by statute (B) a duty of care imposed by Common Law. It is clear from the Third Amended Claim that it is **not said** that:

*“the fourth defendant receiving the altered mortgage deed from the first defendant had **no right** to rely on the first defendant’s representation for the accuracy of its contents.”*

[27]. By the proposed Fourth Amended Statement of Claim, the nature of the plaintiffs’ action had been substantially changed in a manner not reasonably to have been anticipated by the fourth defendant. We do not have in this country an inquisitorial procedure for civil litigation. Our procedure is accusatorial. Those who make charges must state right at the beginning what they are and **what facts they are based on.**

[28]. The proposed causes of action in negligence and breach of statutory duty is something essentially different from that which was pleaded earlier [fraud misrepresentation and deceit]. The allegations of Director of Lands negligence and breach of statutory duty are new causes of action. They do not arise out of the facts pleaded in the Third Amended Statement of Claim in relation to forgery, fraudulent representation and deceit. The proposed causes of action in negligence and breach of statutory duty depends entirely on different facts which were not pleaded or even hinted at in the Third Amended Statement of claim. The proposed claim for negligence and the breach of statutory duty stand or fall independently of the claim for fraud, fraudulent representation and deceit.

[29]. The proposed allegation that the Director of Lands is responsible for endorsing his consent on the second mortgage on the altered mortgage deed is a new cause of action. It substantially alters the nature of the case to make it in effect a



new action. This constitutes the addition of a new cause of action. As I read the proposed amendment it involves a quite different set of ideas, a quite different allegation of facts, quite new considerations, and quite new sets of facts and quite new causes of damages. The new allegation of negligence and breach of statutory duty against the Director of Lands are quite different in facts and quality from the allegations of fraud, fraudulent misrepresentation and deceit made against the first defendant. The proposed amendment not only produced a new case, a new set of ideas and facts; it actually produced a new causes of action, since the causes of the action for fraud, fraudulent misrepresentation and deceit are completely different from the causes of action of negligence and breach of statutory duty.

[30]. Breach of statutory duty can be properly described as “statutory negligence”. According to the Third Amended Statement of Claim the essence of the plaintiffs claim is (1) fraud (2) fraudulent misrepresentation (3) deceit. The proposed allegation of negligence and breach of statutory duty depends entirely on different facts and circumstances and they stand or fall independently of a claim for (1) fraud (2) fraudulent misrepresentation (3) deceit.

[31]. Counsel for the fourth defendant is correct. The proposed amendment relies on new facts and do not meet the requirements in Order 20, Rule 5(5) which is in the following terms.

*An amendment may be allowed under paragraph (2) notwithstanding that the effect of 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 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.*

[32]. The cause of action that is attempted to be added by the proposed Fourth Amended Statement of Claim is new cause of action and **it relies on new set of facts, new considerations, and new set of ideas and different allegation of facts.**

[33]. The Director of Lands endorsed his consent on the altered mortgage deed on 04.06.2004 and on 06.01.2006, he granted his consent to sell the plaintiffs’

property to the second defendant. The causes of action that are attempted to be added are new ones, and the period of limitation has expired. The court will not grant the application which would deprive the fourth defendant of the statutory protection which time has brought him. The proposed amendments makes new allegations and sets up a new causes of action against the Director of Lands and if granted would allow the plaintiffs' to take advantage of their former writ to defeat the statute of limitation and take away an existing right from the fourth defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust.

[34]. The law does not allow the statutes of limitation to be circumvented by the device of bringing in a fresh claim by amendment of the pleadings in the pending action.

**ORDER**

The plaintiffs' application to amend the Third Amended Statement of Claim is refused.



Jude Nanayakkara  
**JUDGE**

High Court - Suva  
Tuesday, 27<sup>th</sup> September, 2022