

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
EXERCISING CIVIL JURISDICTION**

CIVIL ACTION No. HBC 65 of 2019

BETWEEN : **FARER GROUP PTE LIMITED**, a limited liability company, having its registered office, Amarsee Building, Main Street, Nadi.

PLAINTIFF

AND : **THE FIJI SUGAR CORPORATION LIMITED**, a limited Liability Company, having its Registered Office at Drasa Avenue, Balawa, Lautoka.

DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie.

APPEARANCES : On 14th July 2025 -Mr. Narayan A. (snr) with Mr. Narayan A. (jnr) & Ms. Wong E. For the Plaintiff
On 21st November 2025 Mr. Narayan A. (jnr) for the Plaintiff.
Mr. Adrian Ram – For the Defendant on 14th July 2025 & 21st November 2025.

HEARING : On 14th July 2025 & 21st November 2025

WRITTEN SUBMISSIONS: By the Plaintiff filed on 14th July 2025 and 16th January 2026.
By the Defendant on 14th July 2025 and 11th December 2025.

DECIDED : On 6th March 2026.

RULING

(On Amendment of Statement of Defence, Reason for Adjournment & Costs)

A. INTRODUCTION:

1. When the substantive claim in this action stood fixed for three (3) days trial on Monday 14th to Wednesday 16th July 2025, Solicitors for the Defendant, on Thursday 10th July 2025, filed a SUMMONS (“ application”) seeking the following Orders;

1. *That time be abridged for service of the summons.*
2. *That the hearing dates set for 14th July 2025 to 16th July 2025 be vacated and matter be adjourned to a mention date.*
3. *That leave be granted to the Defendant to file an Amended Statement of Defence.*
4. *That the cost of this Application be costs in cause.*

2. This Application was supported by an Affidavit sworn by **Mr. BHAN PRATAP SINGH**, the Chief Executive Officer of the Defendant Company, and filed along with annexures marked as “A” to “E”.
3. The Application states that it is made pursuant to Order 32 Rule 3, Order 35 Rule 3 and Order 20 Rule 5 of the High Court Rules 1988.

B. HEARING OF SUMMONS:

4. The Order 1 above being instantly granted with the abridgement of time for service, and the Application being served, when it came up for inter-partes hearing on 14th July 2025, which happened to be the first date of 3 days trial, Counsel for the Plaintiff vehemently objected to the Application and made lengthy oral submissions, apart from filing the skeleton written submissions as well.
5. Counsel for the Defendant, having filed their skeleton written submissions, also made lengthy oral submissions in support of the Application, and at the end of the hearing, this Court granted the order 2 above vacating the 3 days trial, however reserving the reasons for the adjournment. The Order 3 above sought by the Defendant for the Amendment of the Statement of Defence, and the order on the incurred costs moved by the Plaintiff on account of the preparation for the trial, were also reserved. As the Plaintiff’s counsel had subsequently changed his initial position not to object to the amendment of the Defence, the Defendant’s Application for the Amendment of the SOD became a contested one.
6. Accordingly, pursuant to filing of the Affidavit in Response by the Plaintiff on 01st August 2025 and the Affidavit in Reply by the Defendant on 01st September 2025, this Court on 2nd September 2025 decided to have further hearing and accordingly heard both the Counsel on 21st November 2025, up on which both the Defendant’s and the Plaintiff’s counsels filed further written submissions on 11th December 2025 and 16th January 2026 respectively.

2nd Application for Amendment & Adjournment of Trial:

7. When the Ruling on the said Application for the Amendment of the Statement of Defence and on the said ancillary matters was due on 29th January 2026, the Solicitors for the Defendant on 28th January 2026 filed a NOTICE OF MOTION (Application) supported by an Affidavit sworn by the said Director Mr. BHAN PRATAP SINGH seeking, *inter alia*, the following orders.

2. *The Defendants be granted leave to further file an amended statement of Defence.*

4. *The hearing date for **30th March 2026 to 2nd April 2026** be vacated and matter be adjourned to a mention date to fix a fresh hearing date.*

8. Accordingly, on filing of the said Notice of Motion on 28th January 2026, the pending Ruling scheduled for 29th January 2026 on the initial Application for Amendment was put on hold, and when the matter came up on 12th February 2026 to consider the said Notice of Motion, Senior Counsel for the Plaintiff Mr. A. Narayan objected to the said Notice of Motion, which included prayers, among others, for further Amendment of

the Statement of Defence and Vacation of the trial that was adjourned on 14th July 2025 and re-fixed for **30th March to 2nd April 2026**.

9. After hearing the Senior Counsel for the Plaintiff Mr. Narayan, as the Senior Counsel for the Defendant Mr. Adrian Ram was not in Court due to his being away from Fiji on account of his Health issue the Court decided to consider the said Notice of Motion in the presence Mr. Ram, and fixed the Ruling on the Defendant's first Application for today 6th March 2026.

C. BACKGROUND HISTORY IN BRIEF:

Statement of Claim:

10. In its Statement of Claim ("SOC") filed on 22nd March 2019, the Plaintiff averred, *inter alia*, THAT;
- a. On or about 26th October 2016 and 13th April 2017 the Plaintiff and the Defendant entered into two separate Contracts for the grant of license for the use of the Defendant's Railway system between **Nadi Town and First Landing** Resort, and of that between **Nadi Town and Momi Bay- Saavusavu point** respectively for the plaintiff to operate Tourism Train in consideration of an annual fee of \$10,000.00 on each Contract.
 - b. The grant of License was for the exclusive use of the Railway System by the Plaintiff between the said destinations.
 - c. The term of the both Contracts was for 10 years commencing from 1st January 2017 and 2018 respectively with an option to extend.
 - d. Under clause 6 of both the Contracts, for "Termination", it was stated, *inter alia*;
 - a. *Either party may terminate by consent on six (6) months' notices.*
 - b. *In the event that the tramline is nationalised, the licensor shall exercise its rights to terminate this Agreement by consent.*
 - e. While the Plaintiff relied on the License and was in preparation for the setting up of the operations, the Defendant, by its letter dated 24th March 2018, unilaterally, illegally and in breach of the contracts terminated the License without seeking the consent of the plaintiff in terms of clause 6 of the Contract.
 - f. The Defendant on the advice of its CEO pursuant to the meetings on 20th June 2018 and 5th September 2018 confirmed to the plaintiff that none of the tramlines covered by the license would be given under the License as the Railway Lines had been nationalised.
 - g. By the letter dated 15th March 2019 from the Defendant's Solicitors, the Defendant repeated and confirmed the termination of the license.

h. No consent of the Plaintiff was obtained.

11. Accordingly, the plaintiff prayed for reliefs, *inter alia*,

1. A declaration that the Defendant's termination of the licenses was unlawful and breach of contracts dated 26th October 2016 and 13th April 2017.
2. Special damages in a sum of FJ\$464,824.00,
3. General damages,
4. Interest at 13.5% on the said amount,
5. Aggravated damages, and
6. Costs on full Solicitor / client indemnity basis.

Statement of Defence ("SOD")

12. The Defendant on 4th April 2019 filed its Statement of Defence (SOD) and took up the defence, *inter alia*, as per paragraphs 9 and 10 thereof THAT;

"9. *The Defendant further states that clause 6 of the contract in so far it requires the consent of the Plaintiff for termination by the Defendant, if the tramline was to be nationalised, is meaningless on the reading of the whole contract".*

"10. *The Defendant further pleads that the part of clause 6 that requires the Plaintiff to consent to a termination in the event of a nationalization of the tramline system, ought to be severed from the contract as it is meaningless, uncertain and therefore unenforceable". (Emphasis added)*

13. Accordingly, the Defendant moved for the dismissal of the Plaintiff's action with costs on full indemnity basis.

D. AGREED FACTS & ISSUES:

14. Pursuant to the Pre-Trial formalities, parties recorded (08) Agreed Facts and (09) Agreed Issues, of which the pivotal Agreed issues are reproduced bellow for the purpose of lucidity and easy comprehension, which in my view, would ably guide this Court in the determination of the Defendant's Application for the Amendment of its SOD.

Agreed Facts:

1.
2.
3.
4.
- 5.
6. *The licenses were subject to the terms and conditions contained therein and expressly provided, inter alia, as follows:*
 - i.
 - ii.

iii.

iv. **Termination:**

(a) either party may terminate by consent on six months' notice;

(b) the Defendant had a right to terminate the contracts in the event of nationalization, subject to the consent of the Plaintiff; (Emphasis added)

7. *It was an essential term of the contract and the Defendant covenanted with the Plaintiff, that the latter was granted exclusive and peaceful use of the railway system for the operation of a tourist train for the duration of the licenses.*

8. **On or about 24th March, 2018, the licenses were terminated by the Defendant without the consent of the Plaintiff.** (All Emphasis added)

15. Accordingly, the matter was fixed for trial between 19th to 21st June 2023, and thereafter between 30th July to 1st August 2024. The trial on the said dates did not eventuate due to various reasons. Finally, when the trial stood fixed for 14th to 16th July 2025, the Defendant filed the Application in hand seeking for the vacation of trial dates and for the Amendment of its Statement of Defence.

16. The above trial dates for 14th to 16th July 2025 had been fixed on 16th October 2024 when the Defendant's former Solicitors **Messrs. Neel Shivam Lawyers** were on record. However, the Application in hand for vacation of the Trial and the Amendment of the Statement of Defence was filed only on 10th July 2025, by **Messrs. Gibson & Company**, who had come on record for the Defendant on 9th July 2025. This Application had been filed just one **working-day** ahead of the trial date,

17. Pursuant to the initial hearing on 14th July 2025, the Order No. 2 as per the Defendant's Application was granted on the same day by vacating the trial and reserving the reasons for the same. The Ruling on the claim made by the Plaintiff's Solicitors for the recovery of the incurred costs in a sum of \$55,159.29 up to and on account of the preparation for the trial on 14th to 16th July 2025, was also reserved to be included in this Ruling.

18. Though, the Defendant had filed an Amended SOD on 17th July 2025, on the understanding that the plaintiff was not objecting to the Defendant's Application, as the Plaintiff had subsequently objected to the same, the Amended statement of Defence was put on hold till the determination of the Defendant's Application after a further hearing.

19. Accordingly, pursuant to the filing of the Affidavit in opposition and reply, and further hearing held on 21st November 2025, this Ruling is pronounced (1) In relation to the Order sought for the Amendment of the Statement of Defence, (2) Giving reasons for the vacation of trial on 14th July 2025, and (3) On the claim by the Plaintiff for the incurred costs.

E. THE LAW:

20. The law in relation to amendments is well settled. Order 20 Rule 5 of the High Court Rules 1988 is the relevant provision, coupled with several case authorities on this issue.

21. The Order 20 Rule 5 of the High Court Rules provides for the Court's power to grant leave to amend the pleadings. The order 20 rule 5 provides:

"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."

22. The above Rule in its plain meaning gives a broad discretion to the Court to allow amendment of pleading at any stage of proceedings, and such discretion should be exercised in accordance with the well-settled principles. Lord Keith of Kinkel delivering the opinions of the House of Lords in ***Ketteman and others v Hansel Properties Ltd [1988] 1 All ER 38***, held at page 48 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".

23. There are number of authorities, which set out the principles that can guide the Court when exercising this discretion provided by the above Rule. The following principles, of course not exhaustive, emerge from the authorities:

- The discretion should not be exercised to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence (***Ketteman and others v Hansel Properties Ltd (supra)***).
- There is a difference between allowing amendment to clarify the real issues in dispute and those that permit a distinct defence to be raised for the first time (***Ketteman and others v Hansel Properties Ltd (supra)***).
- All such amendments ought to be made as may be necessary for the purpose of determining the real questions in controversy between the parties (***R. L. Baker Ltd v Medway Building & Supplies Ltd [1958] 3 All E.R. 540.***).
- Amendment of genuine mistake and negligent or careless omission, without any fraudulent intention, should be allowed, if it can be done without injustice to the other party (***Cropper v. Smith (1883)26 Ch. D. 700; Clarapede v. Commercial UnionAssociation (1883) 32 WR 262.***).
- There is no injustice if the other side can be compensated by costs (***Clarapede v. Commercial UnionAssociation (supra)***). However, the justice cannot always be measured in terms of money and cost (***Ketteman and others v Hansel Properties Ltd (supra)***).
- Amendment to include the new defenses created by a new statute could be allowed (***Application des Gaz SA v Falks Veritas Ltd [1974] 3 All ER 51.***).
- Amendment to include the materials obtained on discovery will be permitted. However, if it is for the purpose ulterior to the pursuit of the action, it should not be allowed (***Omar v Omar [1995] 1 W.L.R. 1428; Mialano Assicuraniona Spa v Walbrook Insurance Co Ltd [1994] 1 W.L.R 977.***).

- The ultimate purpose is to do justice between the parties (***Ketteman and others v Hansel Properties Ltd(supra); Reddy Construction Company Ltd v Pacific Gas Company Ltd; Sundar v Prasad [1980] 26 FLR 121 (27 June 1980)***).

24. The Fiji Court of Appeal in *Reddy Construction Company Ltd v Pacific Gas Company Ltd (supra)*, succinctly summarized the test applicable and held that:

“The primary rule is that leave may be granted at any time to amend 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 amendments 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”.

25. Again, in ***Sundar v Prasad [1998] FJCA 19; Abu0022u.97s (15 May 1998)*** the Fiji Court of Appeal further emphasized the test and stated how the balance to be made between the interest of the party seeking the amendment and the other side, which incurs the cost. The Court unanimously held that:

*“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 have that effect are usually allowed, unless the other party will be seriously prejudiced thereby (***G.L. Baker Ltd. v. Medway Building and Supplies Ltd [1958] 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 that test is met, leave to amend may be given even at a very late stage of the trial (***Elders Pastoral Ltd v. Marr [1987] NZCA 18; (1987) 2 PRNZ 383 (C.A.)***). However, the later the amendment the greater is the chance that it will prejudice other parties or cause significant delays, which are contrary to the interest of the public in the expeditious conduct of trials. When leave to amend is granted, the party seeking the amendment must bear the costs of the other party wasted as a result of it”.*

26. Order 20 Rule 5 gives this Court the power to allow for the seeking party, leave to amend their pleadings at any stage of the proceedings on the basis that such amendment sought is for the purpose of determining the real question in controversy between the parties to any proceeding.

27. I have also taken into consideration the following case Law authorities, which deal with the principles of amendments-

(a) ***Fiji Electricity Authority v Balram & Others [1972] FJLawRp 4; [1972] 18 FLR 20 March 1972***) Goudie J said-

“An amendment to pleadings may be permitted by the court at any stage of the proceedings for the purpose of determining the real question in controversy and, if it can be made without injustice to the other side should

be allowed however late, and however negligent or careless may have been the first omission”.

- (b) **Aero link Air Services Pty Ltd v Sunflower Aviation Limited [2017] FJHC 181; HBC013.2011**- the court said at paragraph 4:

“..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).”

- (c) **Cropper v Smith (1883), Bowen L.J** notes:

‘.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”

F. THE TEST FOR GRANTING AMENDMENTS:

28. The test to be applied is whether the amendment is necessary in order to determine the real controversy between the Plaintiff and the Defendants, and that it does not result in injustice to the other party.

G. ANALYSIS:

29. The Defendant has on 10th July 2025 made this Application for the Amendment of the SOD, after a period of around 6 years and 3 months from the date of filing its original SOD on 4th April 2019. This Application happened to be made through its newly appointed Solicitors on 8th July 2025, just six days prior the 3 days trial fixed to commence from 14th July 2025. I concede that the application for amendment can be made at any stage of the proceedings as per the Order 20 Rule 5.
30. Careful perusal of the original Statement of Defence shows that the former Solicitors for the Defendant, in paragraphs 9 and 10 thereof, had taken up the position that the requirement of the Plaintiff’s consent for the termination of the contract by the Defence, in the event the Tramlines were to be nationalised, **is meaningless, and therefore the requirement of consent ought to be severed from the contract as it is also uncertain and unenforceable.** (Emphasis added)

31. It is based on the said pleadings by the Defence, the Agreed Facts, *inter alia*, No-6 iv (a) & (b) and 7, which are highlighted in paragraph 14 above, and the issues, *inter alia*, No-1 to 5 were recorded at the PTC and the matter finally stood fixed for trial on 14th July 2025. Now the Defendant appears to be in a sudden move to advance a substantially, and radically, different defence to the initial one filed on 4th April 2019. This move also shows that the Defendant is going to take a completely different position from what was agreed upon in both the contracts, in the Agreed facts highlighted above, and in the Agreed issues No-1 to 5. The crucial issues are reproduced below for the purpose of lucidity and easy comprehension.
1. *Whether there was a "nationalisation" of the tramline and railway system by event providing a ground to terminate?*
 2. *If so, whether the Defendant was bound by clause 6 of the contracts to seek the Plaintiffs consent prior to terminating the contracts?*
 3. *Whether the Defendant is entitled to rely on the Defence that the condition requiring the Defendant to obtain the plaintiffs consent under clause 6 of the contract was meaningless, uncertain, and whether it can seek severance of that requirement?*
 4. *Whether the contracts became impossible of performance to discharge by the Defendant for the reasons stated in its letter dated 24th March, 2018?*
 5. *Whether the termination by the Defendant was unlawful and in breach of the terms of the contracts?*
32. With the apparent and unambiguous clauses in the impugned Contracts, crystal clear Agreed facts and issues recorded at the PTC, the actual dispute between the parties that begs adjudication has been duly laid down before the court, and I don't see any necessity for any more issues through further amendment, which may compel the Court to go beyond the agreed terms of the contracts.
33. As per the clauses of the impugned contracts, the pleadings, admissions and the current issues before the Court, I am of the view that the court is at a better position to dispose the matter before it conveniently, fully and finally without having to go beyond the agreed terms of the contracts in this matter.
34. The inclusion of the terms "**by consent**" in paragraphs 6 of both the contracts, in my view, appears to be not without any purpose, or "meaningless" and unenforceable as argued by the Defence counsel. It appears to be a key term introduced into the contract in order to safeguard the interest of the Plaintiff, who may become the victim of an early determination of the contract rightly or wrongly by the Defendant. However, it must be put on record that I am not in an attempt to answer those issues through this Ruling since it has to be done after a full-scale trial.
35. I am of the firm view that it will result in an immense prejudice to the Plaintiff, if this Court allows the proposed amendments, which will undoubtedly lead to the "pruning" of the protection provided to the Plaintiff through the contract against any loss that could occur as a result of any sooner determination of the contract by the Defendant.

36. Those issues that stand raised based on the existing pleadings are already questioning the “Meaningfulness”, “Enforceability” and/ or “Validity” of the impugned terms “**by consent**” included in both the contracts. A mere glance at the Terms of those contracts suggests that the said terms have been inserted into the contract not without any purpose. However, as the final decision on it depends on the evidence to be adduced at the trial, I stand convinced that the current issues raised revolving around the propriety of the impugned terms “**by consent**” in the contracts, will ably assist this Court in the determination of the dispute fully and finally.
37. The Court is duty- bound to decide the dispute between the parties within the four corners of the contracts entered into by and between them and the Defendant cannot be allowed to walk out of the said contracts through the intended amendments, which appears to be aimed at clipping the wings of the Plaintiff by removing the terms “by consent “ included in the contracts.
38. The Plaintiff’s Counsel has taken a stern position that it is a substantially, and radically, different defence to the originally filed one, and one of the key issues within the proposed defence is that the Defendant is attempting to resile from admissions recorded between the parties at the PTC minutes filed on 9th May 2022, around 3 and half years prior to making the current Application.
39. As per Order 20 Rule 5, the decision whether to allow or refuse an Application for the Amendment of pleadings is within the discretion of the Court. When determining such an application for amendment, the Court will go into the questions; as to
- a. *Whether the proposed amendments relate to the “real issues in controversy; and*
 - b. *Irrespective of the above, whether granting leave would cause prejudice to the opposing party?*
40. I have already formed a view that the existing pleadings and issues raised on them are sufficient for this court to arrive at a final decision on consideration of the evidence to be led at the trial. I don’t find any necessity for any amendments as suggested by the Defence, since the triable issues between the parties are already before the Court.
41. In order to add more weight to its Application, the Defendant also appears to be in an attempt to paint a picture to the effect that the last paragraph of clause 6 in both the contracts, which requires the “consent” of the Plaintiff for the termination of the contract, is devoid of meaning, vague and ambiguous when read in whole sentence or clause. Accordingly, counsel for the Defendant argues that the Contract needs to be rectified by deleting / severing the words “by Consent” from the contracts.
42. Cursory reading of the clause 6 of both the Contracts and the contents of the Agreed Fact **6 (IV) (b)**, suggests that, if the Defendant was to exercise its right to terminate the Contract owing to the nationalization of the railway lines, the “Consent” of the Plaintiff was a “sine qua non”.
43. The Defendant in paragraphs 09 and 10 of its initial SOD had also pleaded with regard to the requirement of the Plaintiff’s “consent” and alleged that it is meaningless.

44. The removal of the term “**consent**”, sought through the proposed amendment to the SOD, in my view, is bound to cause serious prejudice to the Plaintiff, which, if allowed, could totally extinguish the plaintiff’s claim. Because, the Plaintiff’s claim in this action appears to be largely relying on the very wordings in clause 6 of the contracts.
45. When the Defendant in its letter dated 24th March 2018 had requested the Plaintiff to remove its equipment out of the railway line site, which in fact amounts to a tacit admission on the part of the Defendant that the Plaintiff had already incurred capital expenses on the project, allowing such an amendment may prematurely shut down the plaintiff’s claim that may become due to him at the end of the trial.
46. Instead of deciding the matter by relying on the unambiguous admitted facts and by answering the issues that are currently before the court based on the existing pleadings on the alleged breach of contract, this court should not engage in a “post-mortem” on the propriety of the terms in the impugned contracts, by allowing an amendment of this nature.

Foreign Investment Act of 1999:

47. On further perusal of the contents of the Affidavit in support, proposed Statement of Defence and the written submissions filed by the Defendant, it appears that the Defendant, for the purpose of this amendment, is now in an attempt to rely on the Section 4 and 16 of the Foreign Investment Act of 1999, which as per the arguments advanced by the Plaintiff’s Counsel, will hold no water.
48. In this regard, the decision of the Court of Appeal in ***Khan v Ali & Anor Civil Appeal No- ABU 55 of 2014 (23 February 2017)***, where it was held there is nothing in the relevant Act that prohibits a party from entering into a Deed and that the intent of the Act was not prohibitory, but rather facilitative. The Court held, *inter alia*;

[17] Similarly, in this case too, the Foreign Investment Act provides that a ‘foreign investor must not carry-on businesses without a Certificate. It does not prohibit the execution of a Trust Deed. What has to be considered is not what acts the statute prohibits, but what contract, if any, it prohibits.

*[18] If the Act does not prohibit either expressly or by necessary implication, a particular type of contract, the court must interpret the provisions of the statute, in order to determine the consequences of the Contract. **In such a situation, the court ought to not allow the defendant to rely on his own complicity to avoid a contract.***

*[22] It is significant that the words used in **Section 4(1), as well as in Section 16 are, “must not”, and not, “shall not”, which indicates that the Act is regulatory and facilitative, and not penal and prohibitive in nature.** The Act as a whole, reveals that non-compliance with the Act is curable, and that changes in the composition of ownership of the enterprise must be notified, in a timely manner to the regulator, to enable the regulatory process to be effective.*

*[23] Despite the words ‘a foreign investor must not carry on a business’ in section 4(1), **it is not a prohibition that is all pervasive with irremediable consequences. In fact, the consultative nature of the role of the Chief Executive under the Act makes it amply***

clear that it is not the intention of the legislature to prevent and prohibit non-Fiji nationals from having shares in local businesses.

[25] Thus the ordinary meaning of the words ‘carrying on business’ cannot be interpreted in a way that does violence to the scheme and object of the Act which, taken as a whole unequivocally points in one direction, namely “to facilitate and regulate”, foreign investment as provided for in the Long Title of the Act. Although the Long Title is not determinative of the specific words in the main text of an Act, it is but a shorthand reference to the general subject matter involved. (Emphasis added)

49. The Plaintiff in this matter had, admittedly, not commenced its business operations, except for making preparations, including the importation of the railway engine / compartment and arranging other formalities. The Act has not specifically prohibited the entering into the contract and engaging in initial preparations as stated above.
50. The proposed new defence attempted to introduce through the amendment relying on the Foreign Investment Act 1999, in my view, will not take the Defendant anywhere. If the proposed amendment is allowed, for which the Application is obviously unmeritorious and serious prejudice would be caused to the Plaintiff. This would be in addition to the prejudice caused to the plaintiff on account of the unwarranted adjournment granted on 14th July 2025, when it was fully ready for the trial, incurring a substantially heavy cost.
51. Further, if the Defendant was to exercise its right to terminate the contract/s, there should have been some evidence shown that the Railway lines had in fact been nationalized.
52. The Defendant has taken up a position that the termination of the contracts was impliedly or expressly agreed to by the Plaintiff. If that is the case, why the Defendant is seeking for the severance of the words “by consent” under the termination clause in the contract?
53. On the alleged unsuitability of the train brought by the plaintiff, there was no allegation from the Defendant in its correspondences prior to the termination. Proposed amendment, if any, in this regard will not assist the final determination.
54. The proposed defence does not bring real triable issues, and it is untenable at law. It also breaches the admitted facts and above all the Defendant has not moved this Court to set aside the already admitted facts, or advanced any ground to do so.
55. The relevant provisions of both the contracts, the recorded Agreed Facts and issues are more than enough for this Court to adjudicate the dispute before the Court fully and finally, without resorting to any further amendments to the Statement of defence.
56. In the light of the aforesaid reasons, I find that the amendments sought by the Defendant are not necessary in order to determine the dispute between the parties in terms of both the contracts entered into by and between them.

Reasons for the Adjournment of Trial:

57. When this Court vacated the 3 days trial on 14th July 2025, the reason for the same was reserved. The Application to vacate the trial was filed on Thursday 10th July 2025 just four (4) days ahead of trial, leaving only one working day in between, and supported before the court on Monday 14th July 2025, being the very first day of the trial. Here again, the Court had the discretion in granting or refusing the adjournment.
58. Extensive submissions, both oral and written, were made by the counsel for both parties on 14th July 2025 to justify their respective positions with regard to the adjournment. The main reason adduced by the Defence Counsel for this adjournment was the proposed amendments to the SOD, for which the leave had been sought in the same Application. Given the complexity appeared to this Court at that time, it was in fact an impractical task for the Court to decide the question of leave to amend so instantly. Thus, an adjournment was warranted and granted.
59. Further, in fairness to the Defendant, and particularly, considering the appointment of the new Solicitors/ Counsel for the Defendant when the trial was around the corner, this Court found that an adjournment moved for was justifiable, however subject to order for costs moved by the Plaintiff.

Costs

60. This Court had to grant the adjournment disregarding the fact that a crucial witness for the Plaintiff had come all the way from Australia, incurring expenses to the Plaintiff on travelling and accommodation. Evidence shows that the Air- Ticket arrangements had been made on 4th June 2025 and the Ticket had been issued on 8th July 2025 all prior to the notice by the Defendant's solicitors on the intended adjournment. Apart from the above, the plaintiff had also incurred substantial cost on the expert's report and for the preparation of the much-awaited trial.
61. However, in the absence of required comprehensive evidence both oral and documentary, this Court is not inclined to allow the entire claim made by the plaintiff in a sum of **\$55,159.29**. In any event, since the Defendant obtained an adjournment that was not warranted, as it appears now, the Court is of the view that in order to lessen the severity of the prejudice to the Plaintiff on account of such an adjournment, it is justifiable to require the Defendant to pay now 50% of such incurred costs, however subject to determination of the balance claim after the trial.
62. Though, the Defendant was at liberty to seek for the amendment at any stage of the proceedings, Procrastination no doubt is not only the thief of time, but it can also affect the diligent litigation and fair adjudication. There is the adage that "justice delayed is justice denied." which on the other hand is "justice hurried is justice buried" and it would not do justice at the end of the day. The overall consideration ought to be the quest to do justice between the parties, that is, to determine "the real dispute or the real question of controversy between the parties."
63. I find that the application to amend the Defence had been made with a view of delaying the proceedings and frustrating the plaintiff, when the real issues raised for the

determination are very clear, particularly, in the light of the Agreed facts recorded at the PTC. I am not convinced that the proposed amendments are necessary in order to determine the real controversy between the parties.

64. As far as the claim for costs of this Application is concerned, I find that the plaintiff was deprived of the opportunity of proceeding with the trial on 14th July 2025 on account of an unmeritorious application for the amendment. The Plaintiff had been waiting for its day in Court for 6 long years. Given the circumstances, allowing a summarily assessed costs in a sum of \$3,000.00, will do justice to the Plaintiff.

H. CONCLUSION:

65. Having considered the application, the affidavit evidence adduced by the parties and the submissions advanced by counsel, I conclude that an application for amendment of pleadings can be made at any stage of the proceedings, even after the commencement of the proceedings (trial) before judgment without an explanation for the delay. However, I find that the proposed amendments do not introduce a new case/defence. The new defence goes against the agreed facts recorded at the PTC on the initial defence.
66. The proposed amendments appear to be solely aimed at clipping the right reserved to safeguard the interest of the plaintiff in terms of clause 6 of the contract, which requires its “consent” for the termination or sooner determination of the contract by the Defendant in the event of a nationalisation of the railway lines, which appears to have had not eventuated at the time material.
67. The words “by consent” provided in the contracts appears to be an inbuilt “safety valve” to ensure that the interest of the plaintiff is protected. It cannot be removed or made ineffective by way of an amendment to the Defence and the Court is bound to adjudicate the matter within the four corners of the contract, without allowing any deletion or addition thereto.
68. In my opinion, the proposed amendment **is not necessary** in order to determine the real controversy between the parties. Serious prejudice to the Plaintiff is inevitable, if the proposed amendments are allowed, which cannot be compensated by award of costs. I would, therefore, refuse to grant leave to amend the statement of defence as proposed. Accordingly, the amended Statement of Defence filed of record should be expunged and the same is hereby expunged from the record.
69. The plaintiff shall be entitled to recover 50% of the incurred cost, which is in a sum of **\$27,580.00**, together with a further sum of **\$3,000.00** being the summarily assessed costs of this Application. The decision on the balance claim for incurred cost is reserved to be made after the trial.
70. The subsequent Application made by the Defendant on 28th January 2026 seeking leave for further amendment will be heard at an earliest date convenient to both counsel.

I. FINAL ORDERS:

- a. The Defendant's Application for the Amendment of the Statement of Defence fails.
- b. The Defendant's Application filed on 10th July 2025 is dismissed, save for the Order made on it for the adjournment of the trial on 14th to 16th July 2025.
- c. The Defendant shall pay the Plaintiff within 21 days from today , a sum of **\$27,580.00 (Twenty-Seven Thousand Five Hundred and Eighty Dollars)** being the 50% of the costs claimed to have incurred by the plaintiff for and up to the preparation of the 3 days trial.
- d. The remaining 50% claim for incurred costs is to be considered after the trial.
- e. The Defendant shall also pay the Plaintiff within 21 days from today a sum of \$3,000.00 (Three Thousand Dollars) being the summarily assessed costs on account of this Application.
- f. The Defendant's subsequent Application, dated **28th January 2026**, for further Amendment of the Statement of Defence and other Orders, to be heard on an earliest possible date.




A.M. Mohamed Mackie
Judge

At the High Court of Lautoka on this 6th day of March, 2026.

SOLICITORS:

For the Plaintiff
For the Defendant

Messrs. A.K. Lawyers- Barristers & Solicitors
Messrs. Gibson & Company- Solicitors- Labasa