

HARI GYAN SEN v FIJI TIMES LTD, TONY YIANNI, NEELAM KUMAR AND KAMLESH ARYA (HBC0462 of 2003S)

5 HIGH COURT — CIVIL JURISDICTION

BALAPATABENDI J

20, 21 November 2012

10 **Practice and procedure — pleadings — amendment to pleadings — damages against all defendants — discontinuance — whether amendment to pleadings required — prejudice — High Court Rules O 18 r 11.**

15 The plaintiff filed an action against the defendants. Subsequently, the plaintiff and the first, second and third defendants filed a Notice of Discontinuance. The Court granted leave to discontinue the proceedings against the first, second and third defendants. The fourth and fifth defendants raised objections to the continuance of the plaintiff's action against them.

Held —

20 (1) In an action where the defendants are not liable severally, and the plaintiff decides to enter into a settlement or compromise with some defendants, the remaining defendants are entitled to know how they are now liable for the same cause of action. This can only be done by an amendment to the pleadings already filed before the court.

25 (2) The fourth and fifth defendants are entitled to know the basis upon which the plaintiff claims damages, which was not disclosed specifically in the amended Statement of Claims. Further, in view of the settlement reached between the plaintiff and the first, second and third defendants, it is not clear how the fourth and fifth defendants are liable, what remedies are sought against them for the same cause of action, and what damage the plaintiff has suffered at their hands.

30 (3) There was a monetary settlement between the plaintiff, the first, second and third defendants which further warrants an amendment to the amended Statement of Claim. Plaintiff to file amended statement of claim. Thereafter, fourth and fifth defendants to file statement of defence.

Cases referred to

35 *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218; *Goodway Rubber Co Pty Ltd v Gurbachan Singh Tyre Centre and Others* [2007] HBC 425/04B; *Perestrello v United Paint Co Ltd* [1969] 1 WLR 570, cited.

S. Sharma for the Plaintiff.

Apted for the 1st, 2nd and 3rd Defendants.

40 *V. Maharaj* for the 4th and 5th Defendants.

[1] **Balapatabendi J.** The Plaintiff filed this action against the Defendants by Writ of Summons dated 8 November 2003, subsequently amended by the amended Statement of Claims dated 4 April 2005.

45 [2] The 1st, 2nd and 3rd Defendants filed the amended statement of Defence dated 18 April 2005 and the 4th and 5th Defendants filed their Statement of Defence dated 5 December 2003.

[3] Pre trial conference was held on 14 December 2007 and minutes of pre trial conference dated 21 January 2008 was filed in the registry on 24 January 2008.

50 [4] Solicitors for the Plaintiff and the 1st, 2nd and 3rd Defendants filed Notice of Discontinuance dated 31st July 2012 in the registry.

[5] On 19 November 2012, when this matter came up for hearing, counsel for the plaintiff and 1st, 2nd and 3rd Defendants sought leave of the Court to discontinue the proceedings against the 1st, 2nd and 3rd Defendants and leave was there after granted by Court in Pursuant to the submissions of both counsel.

5 [6] Counsel for the 4th and 5th Defendants after the leave was granted raised a preliminary objections for the continuance of the Plaintiff's action against 4th and 5th Defendants on the following grounds:-

- 10 (i) Failure of the Plaintiff and the 1st, 2nd and 3rd Defendants to serve a notice of discontinuance in advance to raise the preliminary objection with notice to court and the Plaintiff has caused serious prejudice to 4th and 5th Defendants.
- (ii) Counsel also raised that the pleadings need to be amended and minutes of pre trial conference also need to be amended or re visited for continuance of the plaintiff's action against the 4th and 5th Defendants.
- 15 (iii) Counsel further submitted that as per the notice of discontinuance a compromise, settlement has been effected between Plaintiff and 1st, 2nd and 3rd Defendants by paying the sum agreed upon without any admission of liability and therefore it important and pertinent for 4th and 5th Defendant to know the terms off such settlements.

20 [7] In response for the submissions of the counsel for the 4th and 5th Defendants, counsel for the plaintiff submitted that any objection in relation to the discontinuance should have been made prior to leave being granted and any submission in this regard was now is belated. He further submitted that based on the agreed facts between parties, discontinuance does not have a bearing on the continuance of the Plaintiff cause of action against 4th and 5th Defendant.

25

[8] He further argued that details of any payment by 1st, 2nd and 3rd Defendants to the Plaintiff could be ascertained and verified in the examinations of the Plaintiff and details of such payment need not be necessarily made aware to 4th and 5th Defendants prior to the commencement of the trial. He further argued that in view of the Defences taken up by the 4th and 5th Defendants, in the Statement of Defence, the notice of discontinuance does not affect 4th and 5th Defendants adversely and no prejudice would be cause to them.

30

[9] I have carefully considered the submissions made by both counsel. As it appears from the amended statement of claim dated 4 April 2005, reliefs sought by the Plaintiff against the Defendants are not distinct and further the Plaintiff sought damages against all the Defendants generally and not severally. In consequent to the notice of discontinuance filed against 1st, 2nd and 3rd Defendants, the Plaintiff is now required to explain the basis on which he intends to proceed the action against 4th and 5th Defendants.

35

40 [10] Similarly, 4th and 5th Defendants are entitled to know the basis upon which the Plaintiff claims damages which was not disclosed specifically in the amended Statement of Claims.

[11] Further, in view of the settlement or compromise reached between Plaintiff and 1st, 2nd and 3rd Defendants, it is not clear to court as to how the 4th and 5th Defendant who are co-defendants now liable and what remedies are sought by the Plaintiffs against the 4th and 5th Defendants for the same cause of action and also what damages that the Plaintiff has suffered at the hand of 4th and 5th Defendants.

45

50 For the purpose of clarity and convenience I shall reproduce the notice of discontinuance,

5 “it is hereby recorded that the Plaintiff and the First, Second and Third Defendant having agreed upon a compromise, settlement of this action has been effected by the First, Second and Third Defendants paying the Plaintiff the sum so agreed upon without any admission of liability and the Plaintiff accepting that sum in full satisfaction of all the Plaintiff’s claim herein against the First, Second and Third Defendants including costs and interest, and that this action is therefore wholly discontinued and dismissed against the First, Second and Third Defendants.”

10 [12] It is apparent that there was monetary settlement between Plaintiff and 1st, 2nd and 3rd Defendants which further warrants an amendment to the amended Statement of Claim.

[13] Upon consideration of the above, it is my opinion that 4th and 5th Defendants will not able to meet the allegations properly and effectively unless and until the Statement of Claims is amended.

15 Order 18 r 11 requires that the pleading must contain the necessary particulars of any claim. Following authorities highlight the importance of presenting clear and precise pleadings.

Esso Petroleum Co Ltd v Southport Corporation [1956] AC 218

20 “A system of pleadings is the primary if not the basic, method for stating and resolving disputes, questions of facts or of mixed law and fact between parties to any claim.’ To define and clarify with precision the issues and questions which are in dispute between the parties and fall for determination by the court. Fair and proper notice of the case an opponent is required to meet must be properly stated in the pleadings so that opposing parties can bring evidence on the issues disclosed.

Perestrello v United Paint Co Ltd [1969] 1 WLR 570

25 Where the plaintiff claims that he has suffered damage, *i.e.* injury, of a kind which is not necessary and immediate consequence of the wrongful act, it is his duty to plead full particulars to show the nature and extend of the damages, ie the amount which he claims to be recoverable, irrespective of whether they are general or special damages, so fairly to inform the defendant of the case he has to meet and to assist him in computing a payment into Court, and the mere statement or prayer that he claims damages will not support a claim for such damages.

30 *Goodway Rubber Co Pty Ltd v Gurbachan Singh Tyre Centre and Others* [2007] HBC 425/04B

35 Pleading play a significant role. Pleadings drafted without clarity tends to obscure the real issues for trial, while obscure and prolix pleading unnecessarily obliges the opposing party to comprehend the cause of action and plead to irrelevant matters. “The pleadings set the parameters of the party’s case. There is no substitution for coherent, lucid and succinct pleadings.”

40 [14] It must be noted that in an action where the Defendants are not liable severally and in the event if the Plaintiff decides to enter into a settlement or compromise with some defendants, the remaining defendants are entitle to know as to how they are now liable for the same cause of action and such can only be done by an amendment to the pleadings already filed before the court.

In order to expedite the progress of the case I make the following directions:-

- 45 (i) Plaintiff is ordered to file amended Statement of claim within 28 days.
(ii) 4th and 5th Defendants are ordered to file the Statement of Defence within 21 days thereafter if any.
(iii) Statement of Reply within 14 days thereafter if any.
(iv) Within 21 days thereafter the parties must enter into pre trial conference and minutes of the same to be filed within 14 days thereafter.
50 (v) Thereafter the Plaintiff must take all other necessary steps to list this matter for hearing.
(vi) All orders to take effect from the date of ruling.

- (vii) Costs shall be in the cause.
- (viii) Orders accordingly.

Directions made.

5

10

15

20

25

30

35

40

45

50