

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 256 of 2010

BETWEEN: **WAKAYA LIMITED**

PLAINTIFF

A N D: **MARSHA NUSBAUM**

1ST DEFENDANT/1ST COUNTERCLAIM PLAINTIFF

KENNETH CHAMBERS

2ND DEFENDANT/2ND COUNTERCLAIM PLAINTIFF

DAVID H. GILMOUR

1ST COUNTERCLAIM DEFENDANT

MELIKI T. TUINAMUANA

2ND COUNTERCLAIM DEFENDANT

RENEE D. S. LALA

3RD COUNTERCLAIM DEFENDANT

DILIP K. JAMNADAS

4TH COUNTERCLAIM DEFENDANT

REGISTRAR OF TITLES

5TH COUNTERCLAIM DEFENDANT

ATTORNEY-GENERAL OF FIJI

6TH COUNTERCLAIM DEFENDANT

Before: **Hon. Justice Kamal Kumar**

Counsels: Mr. J. Apted and Mr. K. Jamnadas for the Plaintiff, 1st and 4th Counterclaim Defendants

Ms. L. Raisua for the 1st Counterclaim Plaintiff

2nd Counterclaim Plaintiff in Person

Ms S. Chand for the 5th and 6th Counterclaim Defendants

Date of Hearing: 1 May 2018

Date of Ruling: 28 September 2018

RULING

(Application to File Fourth Amended Counterclaim)

1.0 Introduction

1.1 On 9 February 2018, Defendants/Counterclaim Plaintiffs (hereinafter referred as **“Applicants”**) filed Application by way Summons for Leave to file Fourth Amended Counterclaim.

1.2 On 23 February 2018, being returnable date of the Application, Court gave following directives:-

- (i) Third Amended Counter-claim filed on 9 February 2018, be removed from Court file;
- (ii) Counter-claim Plaintiffs do file and serve Third Amended Counter-claim by 27 February 2018;
- (iii) Parties (except for 5th & 6th Counter-claim Defendants) do file and serve Affidavits/Submissions by 1 May 2018;
- (iv) Application was adjourned to 1 May 2018 at 2.30pm, for hearing.

1.3 Following Affidavits were filed and relied by the parties.

For Applicants

- (i) Affidavit of Kenneth Chambers sworn and filed on 9 February 2018 (**“Chambers 1st Affidavit”**).
- (ii) Affidavit of Kenneth Chambers in Reply sworn and filed on 26 March 2018 (**“Chambers 2nd Affidavit”**).

Respondent

- (i) Affidavit of Ajay Singh sworn and filed on 16 March 2018 (**“Singh’s Affidavit”**).

1.4 Parties also filed submissions and made Oral Submissions in reference to Submissions filed.

2.0 Background Facts/Chronology of Events

2.1 Background facts and Chronology of Events have been set in Ruling delivered in respect to Application for Leave to file Third Amended Counter-claim and as such there is no need to repeat the same.

3.0 Application To File Fourth Amended Counterclaim

3.1 Order 20 Rule 5-(1) (2) and (5) of the High Court Rules provide:-

“5.-(1) Subject to Order 15, rules 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.

(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may

nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3)

(4)

(5) *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.”*

3.2 The test to be applied when dealing with Application to Amend Pleadings was stated by Full Court of Fiji Court of Appeal in **Sundar v. Prasad** [1998] FJCA19’ Abu0022u.97s (15 May 1998) as follows:-

“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) 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 waster as a result of it.”

3.3 In **Ambaram Narsey Properties Ltd v. Khan** [2001] FJHC 306; [2001] 1 FLR 283 (16 August 2001) his Lordship Justice Gates (current Chief Justice)

adopted with approval the following principles in **Cropper v. Smith** (1884) 26 Ch. D. 700 p 710 Bowen L.J. said:-

“Now, I think it is a well-established principle that the object of Courts is to decide the 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. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, 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 of grace.”

and his Lordship added at p 711:

“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.”

3.4 His Lordship further stated that:-

*“Amendment may be allowed “at any stage of the proceedings” which includes during a trial **The Duke of Buccleuch** [1892] P. 201, at p 211 per Lord Esher MR; **G. L. Baker Ltd. v. Medway Building & Supplies Ltd.** [1958] 1 WLR 1216. With some reluctance the trial judge was prepared to allow the statement of claim to be amended in **Loutfi v. C Czarniow Ltd.** (1952) 2 All ER 823 as late as after close of the case but before judgment.”*

3.5 Applicants state that they need to amend the Counterclaim so that all relevant issues are determined properly.

3.6 Counsel for 5th and 6th Defendants stated that since there is no Counter-claim against them they will not make any submissions.

3.7 This Court is of the view that each paragraph that needs to be amended be considered.

3.8 **Paragraph 4 (ee)**

Court agrees with Respondents Submission that Edward Daniel Nusbaum is not party to this proceeding and such amendment sought is disallowed.

Paragraph 4 (g)

Respondent submits that 4th Counter-claim Defendant was not a fiduciary to 1st Counter-claim Plaintiff for period stated in the proposed amendment.

This amended should be allowed and if 4th Counter-claim Defendant denies being in a fiduciary relationship for the period mentioned therein then he can say so in his Defence.

Paragraph 8

This Court accepts Respondents Submission that there is no privity of contract between Edward Nusbaum and the Counter-claim Plaintiffs.

It appears that Counter-claim Plaintiffs are trying to get Edward Nusbaum involved in this proceeding by any means when application to join him as Counter-claim Plaintiff was refused. Hence, amendment sought in respect to paragraph 8 of Third Amended Counter-claim is refused.

Paragraph 12(a)

Counterclaim Plaintiffs are attempting to enforce Edward Nusbaum's Agreement which cannot be allowed. Hence, amendment sought in respect to paragraph 12(a) is refused.

Paragraph 12(a)(i)

Amended is allowed as no objection is taken by the Respondent and it does not in anyway prejudice the Respondent.

Paragraph 12(a)(b-i)

This Court accepts Respondents' Submission that Respondents have nothing to do with Marine Protection Regulation. The issue of Marine Protection Regulation is not an issue between the parties.

Hence, this amendment is disallowed.

Paragraph 12(bb)

Respondent in Singh's Affidavit states that this paragraph is too vague and "common land" referred to has not been specifically defined.

This Court is of the view that the paragraph is not vague and can be properly addressed by the Respondent. Hence, this amendment is allowed.

Paragraph 12(c)

No objection is taken by Respondent to this paragraph and as such is allowed.

Paragraph 12(cc)

This Court accepts Respondents Submission that the allegation in this paragraph is a matter between Edward Daniel Nusbaum and Plaintiff/Respondent and has nothing to do with Counter-claim Plaintiffs. Hence, this amendment cannot be allowed.

Paragraph 12 (ccc)

This Court accepts Respondents Submission that this amendment is re-wording of amendment that was not allowed when Application to file Third Amended Counterclaim was determined. Also the issues raised in this amendment relates to Contract between Plaintiff and Edward Nusbaum who is not a party to this proceeding.

Hence, this amendment is not allowed.

Paragraph 12(e)

No issue is taken by Respondent to amendment sought and such is allowed.

Paragraph 12(f)

Respondents submit that the allegation is in regards to Edward Nusbaum and as such should not be allowed.

With due respect, this Court does not accept Respondents Submission. The particulars provided is for failure of 4th Defendant to inform First Counterclaim Plaintiff about access and Instrument No. 333585 and such should be allowed except for the wordings **“or that the 4 Counterclaim Defendants had no authority from Edward Daniel Nusbaum to certify Instrument No. 333585 correct for the Land Transfer Act.”**

Paragraph 12(h)

Respondent submits that common land is not defined.

Where common land is situated is matter of evidence and amendment sought is not prejudicial to Respondent.

This amendment will be allowed.

Paragraph 14A

Respondent submits that no details are provided as to how allegation of fraud are concealed.

The allegations of fraud appears at paragraphs 12 and 13 of the Counterclaim. There is nothing wrong in Counterclaim Plaintiffs alleging that the conduct complained of have been concealed.

Thus amendment will be allowed as it does not cause any prejudices to Respondents.

Paragraph 14B

This Court repeats its comments in respect to paragraph 4(ee) of the proposed Amendment and disallows this amendment.

Paragraph 15

This Court is of the view that the word “may” in 1st line is speculative and cannot be allowed. The amendment sought in paragraph 15 is allowed in all other respects except for the use of word “may” in first line.

Paragraph 17(a)

Respondents submit that this paragraph deals with issues which accrued after these proceedings had commenced and Counterclaim Plaintiff need to justify the change in value.

This Court allows the amendment and if Respondent intends to dispute the amendment then they can do so in their Defence.

Paragraph 18 and Prayers A(a)(i)(iii) B(a)(i), (i)(aa), B(v)(vi)(viii)

These amendments does not in any way substantively affects the Third Amended Counterclaim and is not prejudicial to Respondents. Hence, this amendment will be allowed.

4.0 Cost

Parties have filed Affidavits and Submissions and it is no doubt that the Amendment will cause additional expenses to Respondents/Counterclaim Defendants.

5.0 Orders

5.1 This Court makes following Orders:-

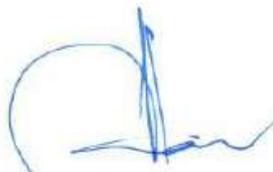
(i)

<u>Proposed Amendment to Third Amended Counterclaim</u>	
<u>Paragraphs</u>	<u>Order</u>
4(ee)	Not allowed
4(g)	Allowed
8	Not allowed

12(a)	Not allowed
12(a)(i)	Allowed
12(a)(b-(i))	Not allowed
12(bb)	Allowed
12(c)	Allowed
12(cc)	Not allowed
12(ccc)	Not allowed
12(e)	Allowed
12(f)	Allowed except for following words “or that the 4 th Counterclaim Defendants had no authority from Edward Daniel Nusbaum to certify Instrument No. 333585 correct for the Land Transfer Act.”
12(h)	Allowed
14A	Allowed
14B	Not allowed
15	Allowed except for us of words “may” in first line
17(a)	Allowed
18	Allowed
Prayers A(a) (i)(iii) B(a)(i)(ii)aa, B(v)(vi)(viii)	Allowed

- (ii) Counterclaim Plaintiffs do file and serve Fourth Amended Counterclaim by 12 October 2018.
- (iii) Respondents (Plaintiff, 1st and 4th Counterclaim Defendants), Registrar of Titles and Attorney General of Fiji do file and serve Statement of Defence to Fourth Amended Counterclaim by 2 November 2018.

- (iii) Counterclaim Plaintiffs do file and serve Reply to Statement of Defence by 16 November 2018.
- (iv) Counterclaim Plaintiffs, 1st, 4th, 5th and 6th Counterclaim Defendants do file and serve Affidavit Verifying List of Documents by 30 November 2018.
- (v) Parties exchange documents by 14 December 2018.
- (vi) Counterclaim Plaintiffs do file and serve Copy Pleadings consisting of Fourth Amended Counterclaim, Statement of Defence to Fourth Amended Counterclaim and Reply to Statement of Defence to Fourth Amended Counterclaim by 31 December 2018.
- (vii) This matter be called in this Court on 23 January 2019 at 9.30 am, to fix trial date;
- (viii) Applicants/Counterclaim Plaintiffs do jointly and severally pay to Respondents/1st and 4th Counterclaim Defendants cost of the Application assessed in the sum \$2,000.00 within fourteen (14) days from date of this Ruling.



K. Kumar
JUDGE

At Suva

28 September 2018

Jamnadas & Associates for the Plaintiff; 1st and 4th Counterclaim Defendants

Naco Chambers for the 1st Counterclaim Plaintiff

2nd Counterclaim Plaintiff in Person

Office of the Attorney-General for 5th and 6th Defendants