

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

Civil Action No. HBC 335 of 2007

**BETWEEN** : **KIFAYAT HOLDINGS LIMITED** a limited liability company  
having its registered office at Beddose Circle, Waqadra, Nadi.

**Plaintiff**

**AND** : **ASCO MOTORS TOYOTA TSUSHO (SOUTH SEA)**  
**LIMITED** a limited liability company having its registered office  
at Ratu Mara Road, Nabua.

**1<sup>st</sup> Defendant**

**AND** : **LAND TRANSPORT AUTHORITY** a duly incorporated body  
established under Land Transport Act 1998.

**2<sup>nd</sup> Defendant**

Counsel : Mr Roopesh Singh for the Plaintiff  
Mr Stephen for the 2<sup>nd</sup> Defendant

**R U L I N G**

1. On 12 February 2018, the Plaintiff filed an application seeking leave to amend its Statement of Claim. The application is made pursuant to Order 20 Rule (5)(1) of the High Court Rules 1988 which provides as follows:

1. That leave be granted to the Plaintiff to amend his Statement of Claim.
2. That the costs of this Application be costs in the cause.
3. Any further or other orders this Honourable Court deems fit.

2. The application is supported by an affidavit of Mohammed Kifayat sworn on 9 February 2018. Mr Kifayat deposes as follows:

1. That I am the Plaintiff named herein.
2. That in so far as the contents of this affidavit are within my personal knowledge it is true, in so far as it is not within my personal knowledge, it is true to the best of my knowledge and information and belief.

3. That on 31<sup>st</sup> October 2007 through my Solicitors I filed Writ of Summons and Statement of Claim seeking damages against Defendants for breach of duties.
  4. That now the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have already settled the matter with the Plaintiff.
  5. That the said claim now before the Honourable Court is based on breach of Statutory Duty of the 3<sup>rd</sup> Defendant where I am seeking special and general damages with Costs.
  6. That the initial pleading was filed in 2007 when the subject matter of the claim was purchased.
  7. That I have been advised by my lawyers that I need to amend my Statement of Claim as amendment is required for fair and proper determination of my case. (Copy of the Amended Statement of Claim is annexed hereto and marked as **Exhibit 1**).
  8. That I believe that the 3<sup>rd</sup> Defendant will not be prejudiced by the amendment sort.
  9. That I therefore pray for the orders sought in the notice of motion filed herewith.
3. The original statement of claim was filed on 31 October 2007. The Plaintiff has since withdrawn its claim against the first and second defendants. The claim against the third defendant is the one that subsists.
  4. The application is being made at the conclusion of the trial of the case after both parties have closed their respective cases.
  5. In **Ambaram Narsey Properties Ltd v Khan** [2001] FJLawRp 71; [2001] 1 FLR 283 (16 August 2001), the headnotes reads as follows:

The First Defendant sought to amend its defence for the third time at a stage during the trial where it was presenting its case and had completed lengthy evidence from two defence witnesses. The need for amendment arose out of unpleaded issues that were raised by a defence witness under cross-examination by the Plaintiff and Second

Defendant. The First Defendant based its application on the need to clear up an ambiguity i.e. that the builder in question was employed as an independent contractor. The Court considered whether there was injustice and/or prejudice caused to the other parties and took into account of the fact that the amendment sought was in respect of issues raised in evidence during cross-examination.

6. Mr. Justice Gates (as the Honourable Chief Justice then was) went on to cite Order 20 Rule 5(1) and said as follows:

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. Czarnikow Ltd.* (1952) 2 All ER 823 as late as after the close of the case but before judgment.

7. The case of Loutfi which Gates J cited in the above passage, cautioned that:

Unless there is very good ground and strong justification for so doing, the court should be reluctant to grant amendments of the pleadings after the close of the case but before judgment, even though it has been indicated in the course of the hearing that some amendment might be asked for.

8. Having sounded that warning, the Queens Bench Division then went on to lay down the factors which a Court must take into account in considering whether or not to grant leave to any party to amend their pleadings in such circumstances:

Such an amendment may be allowed: (i) where the matter involved has been raised in the course of the trial and counsel has addressed the court on it, since it will be merely incorporating in the pleadings that which has emerged in the course of the case as an issue between the parties; (ii) where the fact the subject of the amendment has been referred to by counsel in opening and evidence about it has been given, since there has been sufficient indication in the course of the trial and in the evidence that it is a matter in controversy and the amendment will enable the court to arrive at the view, if it thinks fit, that what is pleaded is a correct interpretation of the facts.

9. The bottom line is that an application seeking leave to amend should be allowed if it is necessary for determining the real question in controversy between the parties.
10. However, a Court considering such an application at a time when the parties have closed their respective cases must be wary that no new or

inconsistent cause of action is being introduced, and if it is, that it is not caught under the provisions of the Limitation Act, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side which cannot properly be compensated for in costs.

11. As Gates J further opined in Ambaram Narsey:

In considering whether to allow a late amendment of the pleadings a court must consider what prejudice might be caused to the other parties. Here the Plaintiff and 2nd Defendant had elected to cross-examine the builder at length on his terms of engagement. Now that the matter is specifically pleaded and the witness is to be recalled after discovery no prejudice will occur to the litigants in meeting the 1st Defendants' claim in their respective cases. Inevitably this case must go part heard again. Such interval will provide further time for the 2nd Defendant to consider what evidence to adduce in challenging the claim clarified by the amendment. Time to meet the amended claim as a result of an abandoned trial hearing date was a significant reason for allowing the appeal and thus the amendment in *Reddy Construction Co. Ltd. v Pacific Gas Company Ltd.* [1980] Fiji LR 121 at p 126H.

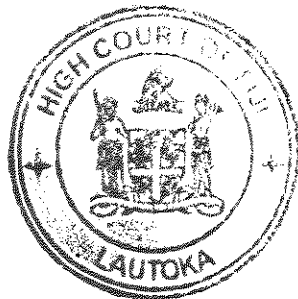
The Plaintiff and 2nd Defendant claim prejudice on the question of limitation, stating they will not now be able to join the builder as a party. This criticism has nothing to do with the amendment of the 1st Defendants' pleadings. In considering who to sue or who to blame, any of the parties could have sued or joined the builder long before this trial commenced. Each one chose not to do so. If their respective claims are now barred by limitation they cannot lay that at the door of the 1st Defendant for the way they chose to frame their initial Defences, and such claims existed quite independently of the 1st Defendants' pleadings. The availability of a cause of action against the builder was a matter that would have been abundantly obvious both to the 1st Defendant as also to the Plaintiff at the time of filing of pleadings or at least several months prior to the commencement of this trial *Hipgrave v Case* (1885) 28 Ch D 356 at p 361. Though there was found to be lateness and carelessness in bring forward the real issue or issues to be tried, the Court of Appeal allowed amendment in *Tildesley v Harper* (1876) 10 Ch. D. 393.

Much will depend of course on the quality of the evidence and credibility of the witnesses on the issue. It would not be proper to penalize the 1st Defendants for failing to include the builder in the line of defence already pleaded that the 1st Defendants relied on the advice and work of persons of competence, professional advisers, in their development of the site.

12. I observe that the plaintiff has always alleged all along that the third defendant had breached its statutory duty in this case. The amendments

sought seek to plead the exact provisions of the Act in question and also to plead some special damages.

13. The plaintiff's counsel submits that the proposed amendment will not prejudice the defendant as much because the issue of the alleged statutory breach was contemplated for in the Pre Trial Conference Minutes and was also canvassed in the plaintiff's opening speech. He also drew attention to the fact that evidence in this regard emerged in chief and also under cross examination.
14. I agree. Any prejudice suffered by the defendants can be compensated for in costs and also can be alleviated by allowing both parties to recall witnesses.
15. I grant Order in Terms. Costs to the Defendant which I summarily assess at \$2,000 (two thousand dollars only). Case adjourned to 05 April 2018 for further directions.



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

Anare Tuilevuka  
**JUDGE**

29 March 2018.