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IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 47 of 1979

Between:

REDDY CONSTRUCTION COMPANY
LIMITED

Appellant

and

PACIFIC GAS COMPANY LIMITED

Respondent

Mr. B.C. Patel for the Appellant
Mr. A.S. Singh for the Respondent

Date of Hearing: 10 June 1980
Delivery of Judgment: 27/6/80

JUDGMENT

Speight J.A.

This is an appeal against decisions given by judges in Chambers at the Supreme Court in Lautoka refusing applications by the appellant (then plaintiff) for leave to amend a Statement of Claim. It is necessary to understand straight away that the matter complained of arose in a slightly unusual way for two judges dealt with the application on separate occasions. Williams J. declined it on 6th July 1979 and for what appears to be a valid reason the matter was again raised on 31st August 1979 before Dyke J. and that

learned judge confirmed the previous ruling.

Although therefore the present appeal is worded as being against "the decision of Mr. Justice Dyke dated 31st August 1979 refusing leave to amend its Statement of Claim" the history/needs to be set out in a little detail.

The plaintiff, a building company, sued the defendant (now the respondent) for balance of payment allegedly due pursuant to a building contract. There is no copy of the Statement of Claim in the appeal book but only the proposed amended Statement of Claim but it is possible to glean its contents by reference to other documents. It was issued on 11th January 1979. It apparently recited that the work had been completed and complained inter alia (paragraph 9) that pursuant to the contract the architect was to give monthly progress certificates on which the owner should pay 90% of such sums within seven days of the certificate and parts of the retention would be thereafter paid at certain intervals after a "completion certificate" issued by the Lautoka City Council. Paragraph 12 alleged that the Lautoka City Council had issued its certificate, so had matters proceeded regularly it might have appeared that the architect had also already certified but it seems that this was not so. It was claimed that the defendant had not paid all amounts owing and the claim was for substantial short payments.

Paragraph 9 of the defendant's Statement of Defence (7th February 1979) reads:

- "9. The Defendant admit the contents of paragraph 9 of the Statement of Claim and further says that certification by the Architect was a condition precedent to the Plaintiff right to payments, and says that because the Architect has not certified further payments because

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of the Plaintiff's default under the agreement, the Defendant is justified in withholding further payments until the certification by the Architect in terms of the building agreement."

In paragraph 12 the defendant alleged that the completion certificate from the Lautoka City Council was obtained by the plaintiff by fraud. The defendant also counterclaimed. The plaintiff on 26th February 1979 filed a Reply and Defence to counterclaim in which it joined issue (inter alia) with paragraphs 9 and 12 of the Statement of Defence.

If we refer back to the challenged paragraph 9 of the Statement of Defence it will be seen that a number of matters were now put in issue:

- (a) that certification by the architect was a condition precedent;
- (b) that the architect has not certified further payments;
- (c) that the defendant was justified in withholding payments.

In his submissions Mr. B.C. Patel for the appellant described this as being as pleading which "required clarification". It was for this purpose, so he claims, that an application was filed on 4th July 1979 for leave to file an amended Statement of Claim. At that stage the Deputy Registrar had already (on 27th April 1979) given a date for a four day hearing to commence on 16th July.

There were several amendments sought. One was to vary certain of the amounts claimed and one was to

correct some arithmetical error - no point arises from these. Plaintiff also sought to add paragraph 18 alleging that the architect had failed to act impartially and independently between the parties and had wrongly withheld certificates for large sums allegedly due. Particulars of this failure were given, viz, that he had deliberately or mistakenly failed to carry out his duties relative to certification and "wrongly and in breach of his duty acted in collusion with the defendant and for that reason did not issue his Certificate",

As already mentioned this application came before Williams J. on 6th July 1979 as an interlocutory matter in Chambers.

Counsel for the plaintiff asked for the amendment and cited Supreme Court Order 20 rule 5 subrule 8/6 and 8.

Counsel for the defendant opposed and the note reads:

" We oppose this - would be unjust to defendants. Date of trial has been fixed. This defence would require amendment to the Statement of Defence. Witness is going overseas."

Authorities were also referred to on the principles applicable.

The learned judge made an order which is set out in full in the case on appeal.

He referred to the fixture for trial on 16th-20th July.

He allowed amendments to the quantum of the claim and the mode of calculation.

He then referred to the proposed amendment relating to the architect's conduct and said:

" Mr. Prasad for the defendant says that the allegations of impropriety on the architect's part and of collusion with the defendant can only be interpreted as an allegation of fraud. Although Mr. B.C. Patel for the plaintiff states that there is no intention to impute fraud I am inclined to the view that the allegation of fraud is set out in all but the use of the word fraud. I do not allow the amendment in that respect.

However, I would allow an amendment to the effect that although the architect had not issued his certificate(s) he was in error in failing to do so and that the building was nevertheless completed according to the plans and specifications. Such an amendment would amount to no more than a clarification of that portion of the plaintiff's reply to the defence which simply 'joins issue' on the defence allegation."

The matter was then ripe for trial but on 9th July, a close relative of Mr. B.C. Patel, counsel for plaintiff, died and because of Mr. Patel's family responsibilities arising from this bereavement the defendant's counsel consented to a request that the fixture be vacated. Thereafter, and presumably in the earlier part of August, plaintiff's counsel had this matter again placed in a Chamber's list at Lautoka. It would appear that a fresh summons was filed for this purpose on 15th August 1979.

However, counsel appeared in Chambers on 31st August. Dyke J. was sitting. Counsel renewed the application for amendment. The note of argument reads:

" SUMMONS UNDER ORDER 20 RULE 5

B.C. Patel:

Present amendment not allowed on 6/7/79 on understanding that case was due for imminent hearing.

Not now the case and amendment is important. It is legal issue being raised.

Prasad:

Reason why previous amendment not allowed see judgment of Williams, Judge of 6/7/79. Not as now stated. Matter has already been adjudicated upon."

The judge's ruling is as follows:

"Ruling:

I feel I am bound by previous ruling by Williams Judge who gave reasons for not allowing the amendment. Plaintiff can perhaps appeal against that ruling but cannot merely go to another judge and hope for a different ruling unless he can show that the circumstances have altered substantially. Application dismissed with costs.

(sgd.) G.O.L. Dyke
JUDGE "

On 19th October 1979 application was made to fix security for appeal which came before Williams J. Counsel appeared for both parties and the sum was set at \$250.

Presumably because of the history recited above Williams J. thought it desirable to write a memorandum as to some matters which had transpired.

He recorded that on the original application for amendment an issue which had figured prominently in the contest between the parties had been the proximity of the hearing, and the fact that the granting of an amendment would call for revised pleadings so that the defendant would either be prejudiced or would have to adjourn. He also recorded the subsequent bereavement in Mr. Patel's family and the unexpected adjournment.

The intent of his memorandum was apparently to make clear that which the learned judge thought was not apparent - namely that the fact that the application for amendment was late in the day was a factor which had been taken into account.

Mr. Singh, counsel for respondent, in this Court, is critical of this memorandum and submitted that it is totally irrelevant and should be disregarded. We think he is on sound ground when he refers to comments by Williams J. as to what he would have done had he been Dyke J. on the subsequent application. These comments are of no interest to this court. As for the first part of the memorandum, suffice to say that an appellate Court might in appropriate circumstances seek further information from the hearing judge as to how matters had transpired.

Here we take the view that the matter is of no consequence because the factual recital upon which Mr. Patel wishes to reply from the memorandum of the judge is apparent from other parts of the record. The grounds of defendant's counsel's defence to the first application clearly show that strong opposition was based on the short time available before trial to meet the new allegation. It is also

clear that Williams J. went as far as he could to grant amendments to put the contest properly in issue by allowing an amendment which raised questions of architect's error without elevating it to a claim of fraud. Indeed this was probably as much as was required for the plaintiff's intended attack, and yet it did not require the defendant to face a completely new allegation of fraud. It was the compromise decision of a judge giving some concession to enable reasonable ventilation of the real cause without prejudicing a defendant with the late raised cry of fraud.

At the appeal hearing a preliminary objection was taken by Mr. Singh concerning the Court's jurisdiction to hear the appeal. He pointed out that under section 12(2)(f) of the Court of Appeal Ordinance an appeal lies against an interlocutory decision only with leave of the judge or of this Court. No such leave had been given prior to today's hearing and this is clearly a matter where leave is required.

It was intimated to Mr. B.C. Patel by this Court that his submission that section 12(1)(a) exonerated him from the necessity of obtaining leave was not viewed favourably. Consequently he applied informally to this Court for leave to be granted. It is known that in other cases such applications have sometimes been refused - it is a matter for discretion in each case. In one such case appellant had been warned that this point would be taken - not so here. It is apparent that Motion for Security for Costs on appeal was filed and heard and determined by Williams J. on 19th October 1979. Counsel for respondent was present and could have been under no misapprehension as to

appellant's intentions. In the circumstances we think it an appropriate case to receive the application at this stage, and leave to appeal is granted accordingly.

We therefore turn to the real issue. Was Dyke J. wrong in confirming the previous ruling when he dealt with the renewed application?

Counsel canvassed various well known authorities. Most of these are collected in the Supreme Court Practise (1967) in the notes to Order 20 rule 5 at pages 300-304.

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.

Reported Appeal cases must be read with care, noting that sometimes the refusal has been based on the lateness of the application when a position cannot be retrieved because the trial has completed. See for example Shoe Machinery Co. v. Cultan 1896 1 Ch. D. 108 at p. 112 and the discussion of the ratio decidendi of the well known case of Cropper v.

Smith 26 Ch. D. 700. See too Bradford Third Equitable Building Society v. Borders 1941 2 All E.R. 205 particularly at pages 217H to 218A.

An interesting example of the Court of Appeal granting leave is to be found in Tildesley v. Harper 1876 10 Ch. D. 393. As here the proposed amendment was to introduce an allegation of bribery and application was made before trial to correct an evasive Statement of Defence and thereby avoid it being construed as an admission. The application was late, and Fry J. at first instance had doubts about bona fides, refused the amendment and gave judgment as on an admission without a trial. Nevertheless, the Court of Appeal allowed the amendment, despite lateness and carelessness to allow the real issue to be tried.

It is a matter of discretion for the judge, but that discretion may be reviewed if it is clear that it has been exercised on a wrong principle, or a conclusion has been reached which would work a manifest injustice - G.L. Baker Ltd. v. Medway Building Supplies Ltd. 1958 1 W.L.R. 1216. Some more modern authorities are referred to in a more recent decision of the Court of Appeal Re O. 1971 2 All E.R. 744. There it is said that it is the duty of the Court to interfere even in discretionary matters where the decision of the Court below is "improper, unjust or wrong".

We are satisfied that by the time this matter came before Dyke J., circumstances, viz. the imminence of trial, had changed substantially. There was by then no prospect of prejudice to the defendant that could not be compensated by an award of costs. The plaintiff may perhaps have been neglectful, in not

raising the matter initially, but it is frequently said that counsel should be slow to plead fraud. The Statement of Claim seems to have been attempting to rely on the Lautoka City Council's certificate as justifying payment in full. The Defence pleaded that that certificate did not of itself give rise to entitlement and that in any event it had been obtained by plaintiff's fraud and refuge was taken in the absence of the architect's certificate. The plaintiff then had little option but to attack that defence; it would be hard to spell mala fides from the mere fact that this accusation of fraud, which as is said should not be used indiscriminately, was only brought in as a counter to a specific defence of non-certification.

In these circumstances we have no hesitation in saying that this was a proper case for leave to have been granted, once the fixture of 16th July 1979 had been abandoned and the application had been renewed.

Leave to file an amended Statement of Claim, in the form lodged is granted. Costs to the appellant in this Court to be taxed if not agreed.

(sgd.) T. Gould
VICE PRESIDENT

(sgd.) G.D. Speight
JUDGE OF APPEAL

(sgd.) B.C. Spring
JUDGE OF APPEAL