IN THE FIJI COURT OF APPEAL
Appellate Jurisdiction
Civil Appeal No. 68 of 1984

Between :

JOHN ALEXANDER WATSON — Appellant

- and -

BISH LIMITED — Respondent

Mr. R. Patel for the Appellant
Mr. K. Chauhan for the Respondent

Date of Hearing : 14th March, 1985

Delivery of Judgment : 27 March, 1985.

JUDGMENT OF THE COURT

Speight, V.P.

This is an appeal from a final judgment for $7,039.77 given by Rooney J. in favour of the Respondent pursuant to a summons issued by it in the Supreme Court pursuant to Order 14.

The Respondent, as Plaintiff had issued a Writ in the Supreme Court claiming the said sum together with interest from the Appellant, then the Defendant. The Statement of Claim alleged:-

Paras 1-4 : That the appellant had suffered injury in a motor car accident in the course of his employment with the Respondent and had received from it's insurers (the Queensland Insurance Company (Fiji) Ltd) an aggregate of $7,039.77 in full settlement of compensation under the Workmen's Compensation Act Cap 94.

Paras 5-6 : That the Queensland Insurance Company had notified the Appellant and Respondent that should Appellant recover damages from the third party in the motor car collision the compensation would be refundable and that the Appellant had agreed to comply with this requirements.

Paras 6-10 : That in due course a settlement of a damages claim had been reached with the third party and/or its insurers in the sum of $20,000 paid to the Appellant, but despite demands from the Queensland Insurance Company the Appellant had failed to refund any part of the compensation payment and such failure was in breach of his obligations under Section 24 of the Compensation Act.

The Appellant's solicitors filed a Statement of Defence and an Amended Statement of Defence. That later document, in its material part, pleaded to the following effect:-

> The accident in the course of employment was admitted and that "the plaintiff and its insurers voluntarily paid the Defendant...$7,039.77". It was also admitted that "the Defendant's solicitors negotiated with Tropic Sands Limited "(the third party)" for payment of $20,000 as a result of the aforesaid accident and the amount of $20,000 was subsequently paid to the Defendant... and the Defendant signed a discharge acknowledging receipt of $20,000 from National Insurance Company (Fiji) Limited as insurers of Tropic Sands Limited..
>
> It was also admitted that demand had been made on the Appellant for repayment of the $7,039.77 and Appellant denied he was obliged to repay.

All other allegations in the Statement of Claim were denied. However each and every paragraph had been pleaded to, and certain unarguable facts had been admitted, albeit

in guarded terms. Nevertheless it was a proper Statement of Defence within the terms of Order 18 Rule 19 and could not have been challenged as frivolous or vexatious. It certainly was drawn with an economy of admissions and should have put Appellant's advisers on notice that strict proof of the ingredients of the claim would be needed.

In particular it was not admitted that the $7,039.77 was Workman's Compensation; nor that the $20,000 was damages, or how that sum was made up.

The Respondent's Solicitors then filed a Summons under Order 14 Rule 1 for Summary judgment, and filed an affidavit in support. This affidavit, by Mr. Chauhan, acting as Solicitor for Respondent set out the circumstances leading up to the payment of $7,039.77 by the Queensland Insurance Company to Bish Limited, and copies of correspondence were annexed to the affidavit from which it was apparent that this indeed was a Workmen's Compensation settlement. Rooney J. so held. Indeed the acknowledgement by Bish Limited of the payment gave the details of wages, travel and medicine expenses and was signed by Mr. Watson in his then capacity of General Manager. The denial that it had been a Workman's Compensation payment had been rather childish.

There was also annexed to Mr. Chauhan's affidavit a copy of a letter from the Queensland Insurance Company to Bish Limited advising that "the National Insurance Company had settled "this matter" under the relevant Compulsory Third Party Policy by means of a Discharge signed by the injured worker". Request was then made of Bish Ltd for reimbursement of the $7,039.77 expended in regard to the claim.

It is desirable to set out the Discharge in full. It was as follows:-

DISCHARGE VOUCHER

"I, J.A. WATSON HEREBY ACKNOWLEDGE RECEIPT from NATIONAL INSURANCE COMPANY (FIJI) LIMITED as Insurer of TROPIC SANDS RESORT of the sum of TWENTY THOUSAND DOLLARS ONLY Fijian Currency in full settlement, discharge and satisfaction of all and any actions, claims demands and rights whatsoever which I may now have or might have but for this discharge against the said TROPIC SANDS RESORT the owner of Vehicle Registered No. AZ670 or against the said NATIONAL INSURANCE COMPANY (FIJI) LIMITED as Insurer of aforesaid in respect of damage sustained and all other costs and expenses (including my Legal Expenses) incurred by reason of the accident which happened on or about the 22nd June 1980 at or near QUEEN'S RD., NAVUA AND I HEREBY UNDERTAKE not to commence or proceed with any further or other suit or proceeding against the said TROPIC SANDS RESORT or the said NATIONAL INSURANCE COMPANY (FIJI) LIMITED in respect of the said costs and expenses or in respect of any claim which I now have or might have against the said TROPIC SANDS RESORT or the said NATIONAL INSURANCE COMPANY (FIJI) LIMITED whatsoever arising out of or relating to the said accident AND I DECLARE that this discharge of receipt may be pleaded in Bar to any actions, suit or other proceeding now or hereafter commenced or taken by me against the said TROPIC SANDS RESORT or the said NATIONAL INSURANCE COMPANY (FIJI) LIMITED.

Dated this 24th day of June 1982.
at Suva.

SIGNED by the said ....JOHN A. WATSON.....

In the presence of .....

"

An affidavit in reply was filed on behalf of the Appellant.

This claimed that the alleged refund was not due or owing as no "proceedings" for compensation had been instituted in any Court and accordingly Section 24 of the Workmen's Compensation Act did not apply. It was also claimed that the $20,000 received by Mr. Watson was an ex gratia payment and did not represent an award of damages to which Section 24 applied. (Emphasis added).

And finally the affidavit claimed that there was a good defence to the action on the merits and hence there was an issue in dispute which should be tried.

The Summons came before Rooney J. and he issued a judgment on 3rd August 1984 in which he held that

(1) The $7,039.77 was a payment for Workman's Compensation.

(2) That although formal court proceedings had not been issued, nevertheless there must have been a claim formulated and settled and those constituted "proceedings" within the wording of Section 24 (Thompson & Sons v. The North Eastern Marine Engineering Company Limited 1903 1KB 428 applied).

(3) That as the Appellant had succeeded in obtaining compensation and also damages from a Third Party he could not retain the benefit of both, and must make restitution of the sum received for compensation. Accordingly final judgment was entered for the Respondent for $7,039.77 together with interest and costs.

The Appellant's original appeal set out a number of grounds - four in all. Before this Court the Appellant's counsel obtained leave, not opposed by Respondent's counsel, to add an additional ground:-

> " That the learned Trial Judge erred in law in entering final judgment under Order 14 of the Rules of the Supreme Court. "

In the event Counsel did not argue grounds 1-4 which had related to the learned Judge's interpretation of Section 24, and in particular the relationship of that section to the money claimed.

For reasons which we will enlarge on later we will have to make some reference to Section 24 in considering the submission at Ground 5, for that involves an examination of whether or not the Defendant (now Appellant) had an arguable defence - and that, as will be seen, turns in part on the meaning of Section 24.

As a preliminary point Mr. Patel for the Appellant submitted that the Summons should not have been entertained because, although the Statement of Claim had been served, and the defendant had entered an appearance there had not been, so it was claimed, an affidavit complying with Order 14 Rule 2.

In the Supreme Court Practise (1967) (The White Book) the following note appears at page 117:

> " The affidavit may be made by the Plaintiff or by any person duly authorised to make it. If not made by the Plaintiff, the affidavit itself must state that the person making it is duly authorised to do so - Chingwin v. Russell (1910) 27 T.L.R. 21".

Now the affidavit here did not so state. But it was made by the Solicitor for the Plaintiff, and it said that he was acting for the plaintiff in the action, and the Statement of Claim, which was referred to in the affidavit, was signed by that Solicitor. It would only be a matter of inference that he was authorised to swear the affidavit - and although strict compliance with the Practise note is desirable we are not disposed to stand so precisely on this technicality as to strike out the judgment so obtained on that ground. Particularly when it is noted that the same practise note goes on so say that defects may be remedied by supplementary affidavit and the Court will look at the matter on merits. Les Fils Drey-fus v. Clarke (1958) 1 W.L.R. 300.

We were told that this objection had not been raised earlier than the hearing in this Court. Had it been, then doubtless the minor error could have been remedied, and accordingly we do not uphold this technical point.

Of much more substance however is the submission made by Mr. Patel that the material before the learned Judge showed that there was a triable issue - namely whether the Plaintiff (Respondent) had shown that this was a case of duplicated payments, entitling it to a refund.

It is convenient to set out Section 24 in full. It reads:-

" (1) Where the injury in respect of which compensation is payable under the provisions of this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under the provisions of this Act for such compensation :

Provided that -

(a) on being awarded such damages as aforesaid, the person against whom such damages are awarded, or the workman, may be ordered by any court to pay to the employer:-

(i) where such damages do not exceed the amount of compensation, including costs, ordered to be paid by the employer to the workman, the amount of such damages; or

(ii) where the amount of damages awarded against such person exceeds the amount of such compensation, the amount of such compensation

(b) if the workman has recovered compensation under the provisions of this Act, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the provisions of section 23 relating to liability in the case of workmen employed by contractors, may be ordered to be indemnified as regards the amount of compensation, including costs, by the person so liable to pay damages as aforesaid.

(2) A court on the application of any person specified in subsection (1) or any court awarding compensation or damages, with or without the application of any such person, may make such order as to it seems just to ensure that the workman does not receive both compensation and damages in respect of the same accident and to implement the provisions of subsection (1)".

The question to be determined was whether, by his affidavit,the Appellant had raised a triable issue - See Supreme Court Practise 1967 Vol. 1 14/3 - 14/4 pp. 119-120. The affidavit had said, albeit in economical terms that :

" the sum of $20,000 was an ex gratia payment and did not represent an award of damages to which Section 24 of the Workmen's Compensation Act is applicable. "

Before moving to what we regard as the crucial point we would say that we concur in the conclusion reached by Rooney J. that the payment of $7,039.77 represented Workmen's Compensation. We also agree that Section 24 does not require formal Court action to be taken, before the employer or its indemnifier can in appropriate circumstances seek a refund if there has been a similar payment included in a successful damages claim.

It should be noted however that the reasoning which was given in the English cases - Thompson & Sons v. North Eastern Marine Engineering (supra), Page v. Burtwell (1908) 2 K.B. 758 and others is not necessarily valid under the Fiji Act, for our Section 24(1) speaks of "proceedings" and "damages awarded" - suggesting that under subsection (1) only concluded Court action is being dealt with. Cases such as the present fall under subsection (2) where, independently of a court award of compensation or damages, an application may be made to the Court, as here, to reclaim a duplicated payment. We agree with Mr. Chauhan's submission that the proceedings he instituted on behalf of the employer were correctly taken, and are appropriate when there have been out-of-Court settlements.

The crucial points for present purposes are the presence of the phrase "may be ordered to pay" in Section 24(1) (a); and "A Court...may make such order as to it seems just" in Section 24(2).

In particular it will be noted that the purpose of giving this discretionary power in the later subsection is specifically to ensure that there is not double payment for the same loss (our emphasis).

For an employer or other person who has paid compensation to succeed in obtaining a refund, he must show that in the damages award or settlement the workman was paid a second time for the same items of loss.

Workmen's compensation generally covers lost wages, travel, medical expenses and the like, and sometimes permanent disability. Damages, in a personal injury claim at common law may cover much more - pain and suffering, loss of future enjoyment of life, and future economic loss at a higher rate.

In the Appellant's affidavit in opposition to the summons it was said that the $20,000 paid did not represent an award of damages to which section 24 of the Workmen's Compensation Act applied.

It was then on the Plaintiff to show, before it could be said that there was no defence, that the $20,000 included damages for loss of wages, medical and travel. That should not have been difficult. The simple process of discovery would have doubtless revealed a letter of demand giving particulars - which the Discharge alone did not contain. In the absence of such proof it could not be said that there was no triable issue. Accordingly the Judgment is set aside and presumably the matter will have to proceed to trial, if no other course is followed.

Costs reserved.

Before leaving the matter we wish to make the following observation.

In the matters leading up to the hearing of the Summons, affidavits had to be filed containing matters which could well have been very contentious. Those contentious matters could have been crucial at the hearing. Yet the affidavits were made by the solicitors for the respective parties who then appeared as counsel in the Supreme Court and before this Court.

This is not proper. It has been mentioned many times before. Practitioners should note that in such circumstances there is a very real possibility that a Court will refuse to hear Counsel who has sworn an affidavit in the proceedings.

.....
Vice-President

.....
Judge of Appeal

.....
Judge of Appeal