IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CIVIL APPEAL NO. ABU 0093 of 2016
(High Court Civil Action No. HBC 279 of 2015)

BETWEEN : **ANAND KUMAR SINGH**

Appellant

AND : **RAMAN PRATAP SINGH**
AMI CHANDRA KOHLI

Respondents

Coram : **Basnayake JA**
Lecamwasam JA
Guneratne JA

Counsel : **Mr. M.A. Khan for the Appellant**
Mr. A. Nand the Respondent

Date of Hearing : **10 May 2018**

Date of Judgment : **1 June 2018**

JUDGMENT

Basnayake JA

[1] This is an appeal to have the judgment of the learned High Court Judge delivered on 30 June 2016 set aside. The learned Judge had in his judgment (pgs. 5-12 of the Record of

the High Court (RHC)) declined the originating summons (pgs. 13-15) with costs in a sum of $1750.00. By originating summons the appellant, in his capacity as counsel, had sued the solicitors for fees.

The appellant's case

[2] The appellant and the respondents were counsel and solicitors respectively to a client named Natadola Bay Resort Limited (NBRL). Admittedly the appellant and the respondents had agreed to share the fees earned from this client in the ratio of 80:20. A payment of $229,111.15 received previously from NBRL was shared between the parties (appellant and the respondents) on this formula of 80:20.

The disputed sum of $98,022.00

[3] As per email AK5 at page 80, bills amounting to $481,078.43 were submitted to NBRL for payment by the appellant and the respondents as lawyers of NBRL. NBRL disputed this figure and civil action No. 142 of 2011 was instituted by the appellant and the respondents as plaintiffs against NBRL as defendants. This case was settled and a deed of settlement was entered (pgs. 25 to 28 of RHC). Paragraph 3.0 of the deed sets out the amount of $98,022.00 to be paid as follows:-i. To Anand Singh (appellant): $18,462.43
ii. To Kohli & Singh (respondents): $79,559.57.

[4] It is the appellant's case that the sum of $18,462.43 is reimbursement for travel costs and attending board meetings while $79,559.57 contained the legal fees which has to be divided between the appellant and the respondents on the agreed ratio of 80:20. The appellant averred that (in paragraph 27 iii of his affidavit dated 13 August 2015 at page 22) *"A similar procedure of payment was adopted whereby the entire cheques were made out to Kohli & Singh was followed in all the cases previously. It is only in the current case that Kohli & Singh has unilaterally deviated from the system and breached the trust."*

The position of the Respondents

[5] The respondents in the affidavit in opposition (paragraph 7 at pg. 44) agreed that the gross income from fees would be divided on the basis that 80% would go to the appellant and 20% to the respondents. The respondents qualified this statement by saying, "for this matter only". The respondents further stated that, "all the expenses in respect of the work for NBRL including wages for staff was to be paid by the appellant from his 80% share. The respondents in paragraph 8 at page 44 admitted that the appellant was paid 80% share on the amount $229,111.15.

Why 80:20% share does not apply to the payment of $98,022.00

[6] The respondents stated that the appellant owed the respondents monies in excess of the sum of $79,559.57. The respondents in paragraph 14 a, b, c, d, e, f, and g had mentioned certain sums allegedly owed to the respondents by the appellant (Note here that the learned Judge had considered as if the appellant had admitted this paragraph. However the appellant had admitted only paragraphs 14 a, b, c. and g). Having doubts of their own claim the respondents take up the position that in the event the court allow the appellant's claim as per the originating summons the respondents would make a claim to set off.

The Deed of Settlement

[7] In paragraph 3 above I have mentioned the figures agreed to be apportioned by the deed of settlement. The respondents do not want to move away from the terms as they are in favour of the respondents. In this case it is admitted that it was the appellant who worked as counsel and engaged in the affairs of NBRL. The respondents were solicitors. The negotiations were done by the appellant with NBRL in arriving at this sum of $98,022.00. The appellant submitted several emails exchanged between the appellant and NBRL (AK 1 to 7 at pages 68-85 of RHC) to substantiate his claim that the sum of $18,462.43 apportioned to the appellant in the deed of settlement was on account of his personal expenses (disbursements for air travel etc.) which is exempted from tax and the sum of

$79, 559.57 contained legal fees which is subject to tax. If the personal expenses were not separated from the legal fees, tax would have had to be paid for the whole sum. This is the reason why legal fees were separated and rightly apportioned to the solicitors. The dispute is with regard to this legal fees apportioned in the deed of settlement to Kohli and Singh.

[8] The appellant's case is that it is customary for the solicitor to claim the legal fees from the client and pay counsel. Although the appellant and the respondents are both barristers and solicitors, the appellant admittedly took up the role of counsel and the respondents as solicitors. It appears from the emails submitted by the appellant that it was the appellant who was engaged in the negotiations with NBRL in arriving at this settlement, the culmination being the drafting of the deed of settlement.

[9] The submission of the appellant is that if the amount of $79,559.57 is to be considered for the respondents, the appellant who appeared as counsel and engaged in the negotiations in bringing about the settlement with NBRL is left without a payment as legal fees. The sum of $18,462.43 is not the legal fees of the appellant but disbursements. As already explained this amount had to be separated from the total figure of $98,022 to get the tax exemption.

Originating summons to convert to writ of summons

[10] The learned counsel for the respondents in their written submissions in paragraph 33 submitted that if the appellate court is not inclined to dismiss the appeal, to have the originating summons converted to a writ of summons and obtain oral evidence. The learned counsel for the respondents reiterated this position at the hearing of this appeal in court to which the learned counsel for the appellant consented. However I do not consider that course is necessary as this case could be disposed of on the material before us. There is no necessity to hear oral evidence.

The Judgment of the High Court

[11] The learned Judge having considered the pleadings found that there is no substantial dispute of facts. Having said that, the learned Judge had observed the acceptance by the appellant of the averments in paragraphs 14a, 14b and 14c of the respondent's affidavit in opposition and the fact of the respondents paying certain funds to Dominion Finance on behalf of the appellant. The learned Judge then goes on to say, "That brings me to the casus belli of this case".

[12] The respondents stated in their affidavit in opposition that there were several money claims due from the appellant to the respondents and that is the reason for the respondents to agree to the sum of $79,559.57 being paid to the respondents directly. The several money claims referred to are set out in paragraphs a, b, c, d, e, f and g to paragraph 14 of the affidavit in opposition (pg. 45 RHC). Of those paragraphs the appellant has admitted paragraphs a, b, c and g. The amounts mentioned in those paragraphs are as follows:- (a) $4676.85 (b) $8,802.96 (c) $1,782.75 (g) $ 10,000.00. Paragraph "g" does not mention an amount. However the appellant in his written submissions dated 15 October 2015 (pgs. 93 to 101 at pg. 99) in paragraph 21 (h) had mentioned this amount as $10,000.00.

[13] The fact of the appellant's admittance of part of the debt owed to the respondent made the learned Judge say; "To my mind, that concludes the matter. In my view there is simply no basis in law or fact for the plaintiff (appellant) to vary the express terms of the deed of settlement". The deed in paragraph 3.0 (pg. 26 RHC) divides the sum of $98,022.00 between the appellant and the respondents at $ 18, 462.43 and $ 79,559.57 respectively. Hence the learned Judge found that the appellant cannot vary the terms set out in the deed of settlement and declined the originating summons.

Where does the learned Judge err?

[14] The learned Judge had correctly observed that there are no substantial disputes of fact in the case. Thus the case was decided on the material set out before court and the written submissions of the parties without oral evidence.

[15] It is admitted that it was the appellant who brought in NBRL as a client. The work of this client was attended to by the appellant as counsel and the respondents as solicitors. The appellant and the respondent had agreed to share the fees of this client on the ratio of 80%:20%. Some payments made previously were shared on that basis and are not in dispute.

[16] It appears from the material before court that a dispute had arisen between the appellant and the respondents on one side and NBRL on the other side. As per email marked "AK 5" (pg. 80 of RHC), bills amounting to $ 481,678.43 was disputed by NBRL. Over this matter the appellant and the respondents as plaintiffs sued NBRL in civil action No. 142 of 2011. It is this case that was settled in which a deed of settlement had been entered.

[17] In terms of this settlement the NBRL had agreed to pay a sum of $ 98,022.00 as full and final settlement (pgs. 25-28 RHC). In arriving at this settlement, negotiations were done by the appellant as counsel on one side and NBRL on the other. This is evident from several emails exchanged between the appellant and NBRL. The appellant had produced these emails with a supplementary affidavit (pgs. 66-67) as AK 1 to AK 7.

[18] The amount $481,078.43 is shown in AK 5 at page 80 of RHC. This email is dated 13 January 2015. On 9 March 2015, the NBRL in response to the appellant's negotiations informed the appellant their intention to settle the debt at $ 98, 022.00. It is this amount that was finally agreed on to be paid to the appellant and the respondents who were the plaintiffs in the civil action against NBRL. This email shows the breakdown of the sum as follows:

- Verified Board meeting attendance 4,500.00
- 30% costs for litigation matters 79,560.00
- Travel Reimbursements 13,962.00

[19] The total of $4500.00 and $13,962.00 is $ 18,362 apportioned to the appellant in the deed of settlement. AK 4 is at pages 76 and 78. This email appears to be in response to an earlier email from NBRL. AK 4 shows the acceptance of the offer made by NBRL. The appellant states in that, "Under duress, I am prepared to accept the offer that you have made". The appellant further requests NBRL to pay direct to the respondents the Bill of costs. The email reads, "The other issue is the Bill of cost from the Barrister (meaning the respondent). Can this be paid to him direct?"

Bill of costs

[20] In the document AK 3 (pgs. 74 & 75 of RHC) under the heading, "Subject; Re: Bill of Costs, the appellant states as follows: "Thank you for your email. The travelling and attendances to Board meetings are to the account of Anand Singh (appellant). The balance of the fee is the account of Kohil & Singh (respondents). Could the funds be disbursed accordingly?" The appellant submitted that the payment made to him separately covered his reimbursements which are exempted from tax. It is also evident from AK 3, how the appellant was advised to forward a certificate of exemption to process the payment to the appellant. No such exemption involved the payment to Kohli & Singh for the reason that this payment was taxable. This appears to have been the reason to make two separate payments. These payments were made on the instructions of the appellant. This position is further amplified by the document AK 1 at page 69 of RHC.

[21] The email AK 1 is dated 1 July 2015. This is by the appellant to NBRL. It states; *"(a) As to the travel re-imbursement that forms my segment of the current proceeds, this ought to be a non-taxable item on the list of payment. Because it is re-imbursement and per diem for travelling you should be in a position to pay this out immediately to me. (b) In so far*

as the amount that is payable to Kohli & Singh a substantial part of the payment is on my account…."

[22] No bill of costs was produced in this case. The bill of costs has been tendered by the respondents. It is evident from the email dated 20 May 2015 (pgs. 76 & 78) to NBRL by the appellant. It is the appellant's case that a better portion of the bill of costs contained the fees of the appellant as counsel. It is this payment, namely, $ 79, 559.57 that has to be apportioned on the agreed ratio of 80:20. After apportioning, the staff salaries and the other expenses are to be deducted from the appellant's share of 80%. The bill of costs ought to reveal the claim made on account of counsel fees.

[23] I am of the view that the learned Judge had erred in considering the deed of settlement without paying any attention to the affidavits and emails which were not disputed and formed part of the record. The learned Judge has also erred by allowing a claim the respondent made against the appellant. The settlement of $98,022.00 was arrived at in the civil action No. 142 of 2011. The present action had to be filed to clarify the payments made in the civil action No. 142 of 2011. Even if the respondent had a claim against the appellant, that claim could not have been considered in the civil action No. 142 of 2011. The deed of settlement has nothing to do with a debt that the appellant had towards the respondents.

[24] The learned Judge has considered the sum of $18, 462.43 as charges for the counsel. The learned Judge has failed to consider the sum of $ 79, 559.57 as containing counsel fee. The learned Judge, having believed the defence the respondents had taken up that the appellant owed the respondents more than the sum allotted to the respondents, declined the originating summons. The respondents claimed that the appellant owed them the amounts stated in paragraph 14a, b, c, d, e, f and g. The appellant has admitted what is stated in some of those paragraphs. Even if the appellant had admitted the whole sum as owing to the respondents, that could not be set off against a payment due to the appellant. There is no evidence of any agreement between the appellant and the respondents for such a setting off.

[25] The respondent's defence is that the appellant owed the respondents a debt. The entire sum of $79,559.57 was claimed in lieu of setting off that debt. In the event that defence is rejected, the respondents' liability is revealed; the respondents' admission of the liability. This defence discloses that a portion of $79,559.57 belongs to the appellant. The appellant filed this action to claim that portion. That is 80% minus the salaries paid to the respondents' staff etc.

<u>The grounds of appeal</u>

[26] The grounds of appeal are as follows:-

1. After having found that the 80:20 formula applied as between the appellant and the respondent for the sharing of the proceeds for legal services rendered to the client, the learned Judge erred in law and in fact in holding that;

    a. The appellant was not entitled to receipt of fees as billed to the client; and
    b. The respondent was entitled to any percentage of fees when there was no evidence of any work performed by it; and
    c. There was a liability for payment for the services of the appellant (Barrister) with the respondent (Solicitor)

2. The learned trial Judge has failed to properly evaluate that the tripartite Deed of Settlement was settlement of the following matters, that is to say,

    a. Re-imbursement of travel allowances and per diem owed personally to the appellant by the client;
    b. Re-imbursement of airfares and other out of pocket allowances payable to the appellant;
    c. That the amounts agreed in the deed to be paid directly to the appellant did not have any fee component thereto;

d. The amount payable to the solicitor (respondent) was an agreed amount for legal services;

e. The Deed did not purport to nor did it settle any liabilities as between the appellant (Barrister) and the respondent (solicitor) *inter se*, and

f. The amounts as agreed between the parties to the tripartite Deed did not purport to reflect nor did it settle the sharing of the proceeds of the legal fee between the appellant (Barrister) and the respondent (solicitor) using the 80:20 formula.

3. The learned trial Judge erred in his use of the Originating Summons procedure when he departed from the agreed or admitted facts and purported to find facts that were not agreed to and were in dispute in the affidavits including inter alia;

   a. The respondent's affidavit that purported to state that the amounts in the tripartite Deed were settled figures for distribution *inter se* as between the appellant (barrister) and the respondent (solicitor) when in fact there was no such agreement.

   b. The respondent's claim from the appellant certain alleged debts that were not admitted by the appellant but rather disputed by the appellant.

4. The costs awarded against the appellant is harsh and excessive.

5. The appellant reserves the right to argue and/or file further grounds of Appeal upon receipt of a copy of the Record in the case from the High Court Registry.

[27] It appears from the above grounds that the whole appeal revolves around the payment of $79,559.57 allocated to the respondent. In the originating summons the appellant sought to share the total sum of $98,022.00 on the agreed formula of 80:20. However it becomes clear from the grounds of appeal and the written and oral submissions made before us that the dispute revolves around the allocation made to the respondent, namely, $79,559.57 to be shared on the 80:20 ratio.

[28] It is abundantly clear that there had been an agreement between the appellant and the respondent to share the fee at 80:20. It is also clear that it is the amount allocated to the respondent, namely, $79,559.57 which was to be shared between the appellant and the respondent on 80:20 basis. The respondents' office expenses etc. has to be borne out by the appellant with the appellant's share of 80%. In the originating summons (pgs. 13-16 of RHC) in paragraph 4 the appellant sought to share with the respondent the total sum of $98,022.00. However there is no doubt with regard to the payment of $18,462.43 allotted to the appellant. The dispute is relating to the portion allotted to the respondent amounting to $79,559.57. It is this $79,559.57 that should be shared between the appellant and the respondent to the proportion of 80:20, minus the expenses of staff salaries etc. of the respondent for that period.

[29] For the reasons given above the judgment of the learned Judge is to be set aside and a judgment entered in favour of the appellant as prayed for in paragraph 4 of the originating summons. The amount to be shared is not $98,022.00. It is $79,559.57 allotted to the respondent in the Deed of Settlement (pg.25). The appellant did not pursue the several other reliefs claimed in the originating summons and therefore those reliefs stand dismissed. Subject to that this appeal is allowed with costs in a sum of $5000.00 (FJD).

Lecamwasam JA

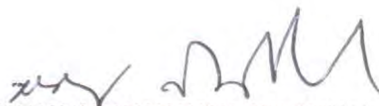
[30] I agree with the reasons, conclusion and orders proposed by Basnayake JA.

Guneratne JA

[31] I too agree with the reasons, conclusion and the orders proposed by Basnayake JA.

Orders of the Court are:

1. *Appeal allowed.*
2. *The judgment of the High Court dated 30 June 2016 set aside.*
3. *Judgment is entered in favour of the appellant as per paragraph 4 of the originating summons as follows:*
    - *i. The sum of $18,426.43 to be paid to the appellant.*
    - *ii. The sum of $79, 559.57 to be shared on 80:20 ratio between the appellant and the respondent.*
4. *The appellant is entitled to costs in a sum of $5,000.00 from the respondents.*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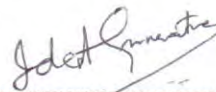
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