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

CIVIL APPEAL NO. ABU 016 OF 2021
[Lautoka Civil Action: HBC 168 of 2006]

BETWEEN : **PALANIAPPAN SUBBAIAH**

Appellant

AND : **THE PUBLIC TRUSTEE on behalf of the ESTATE OF BISSUN DAYAL**

1st Respondent

AND : **RAJESHWAR PRASAD and ANJINI PRASAD**

2nd Respondent

Coram : **Jitoko, P**

: **Jameel, JA**

: **Winter, JA**

Counsel : **Mr. R. Vananalagi for the Appellant**

: **Mr. F. Haniff for the Respondent**

Date of Hearing. : **15 February 2024**

Date of Judgment. : **29 February 2024**

JUDGMENT

Jitoko, P

[1] I agree with the judgment of Jameel, JA together with the reasons and the orders therein.

Jameel, JA

Introduction

[2] This appeal arises from a Judgment of the High Court dated 3 July 2020, which was confined to the determination of costs payable to the Appellant by the 2nd Respondent after the parties had reached an out-of-court settlement on damages claimed against the 1st and 2nd Respondents, arising out of a motor vehicle accident that occurred on 8th July 2003.

[3] The learned High Court Judge ordered the 2nd Respondent to pay a gross sum of costs in a sum of $ 87,130.43, and further costs of $ 1500.00 being costs in the High Court. The High Court granted leave to appeal the judgment.

[4] The Appellant now seeks Fiji Solicitor's costs, costs for the overseas Counsel, Medico -Legal expenses, which were not granted by the High Court, and costs of this appeal on a solicitor-client indemnity basis.

[5] In the Statement of Claim filed on 22nd June 2006, the Appellant claimed special damages for personal injuries sustained in an accident that occurred on 8 July 2003, due to a collision between two vehicles. As a result of the accident, the drivers of both vehicles and all the passengers died, making up a total of five deaths. The Appellant was the sole survivor. One of the agreed issues at the Pre-Trial Conference was whether the deceased driver Bissun Dayal who drove the vehicle in which the Appellant travlled, was the agent or servant of the 2nd Defendant at the time of the accident. The insurance company initially denied liability, but took over the defence later.

[6] The 1st Respondent was the nominal defendant in the proceedings but did not participate in the proceedings, and the 2nd Respondent was the insurer of the vehicle which collided with the vehicle in which the Appellant travelled, when the accident occurred. There was no dispute that the Appellant suffered injuries and was hospitalized in Lautoka for about a week, and on medical advice, was air- lifted to Sydney, where he was hospitalized from 15 July 2003 to 29 July 2003. Thereafter he underwent brain surgery and remained hospitalized in Sydney until October 2003. He eventually went back to his home in India, and returned to Sydney for medical treatment.

[7] In the Statement of Claim the Appellant claimed damages of AUD $ 77, 561.23 and FJD $ 8036.50.

The Offers and Counteroffers of the Settlement

[8] The action did not proceed to trial but was settled out of court, a few days before the date of trial.

[9] To consider the matters raised in appeal it is helpful to set out the correspondence relevant to the settlement reached by the parties, out of court.

[10] The first offer of a settlement from the Respondent had been in 2007 for FJD$ 50,000. This was not accepted by the Appellant.

[11] Seven years after the Statement of Claim was filed, by letter dated 29th August 2013 the 2nd Respondent offered FJD 326,900.00 as a full and final settlement, inclusive of costs and interest on the Appellant's claim. The 2nd Respondent also informed that it had arrived at this offer of settlement after having given careful consideration to the medical and financial reports submitted on behalf of the Appellant and the assessments by their own medical and financial experts, and it accordingly set out a breakdown of the amounts offered.

[12] The 2nd Respondent accepted that the Appellant had suffered injuries following the accident and was prepared to add interest on this sum at the rate of 6%, from the date

of the Writ of Summons up to the date of the said letter, which would amount to approximately $25,200 for 7 years. The Respondent also accepted that the Appellant would need future medical care and hip replacement and was prepared to pay FJD $ 10,000 under this head. In similar vein, the said letter set out a breakdown under the heads of Pain and Suffering, Interest on Pain and Suffering, Cost of Future Care, Loss of Past Earnings, Interest on Loss of Past Earnings and Loss of Future Earnings, which made-up the total of FJD$ 326, 900.

[13] By letter dated 23 September 2013 the Appellant rejected the said offer, and made a counteroffer for $1,500,000.00 (1.5 million).

[14] The 2nd Respondent responded by letter dated 4 October 2013 and acknowledged that the offer of $ 326,900 did not include special damages for past medical care, and attention, travelling and accommodation, and stated further that it took the view that all expenses for past medical care, attention, travelling and accommodation had been met by persons other than the Appellant, and it had not been established that the Appellant was legally obliged to reimburse those persons. The 2nd Respondent also noted that the Appellant was refusing to negotiate in this matter and was insisting on the $1.5 Million claim.

[15] A few days before the trial, by letter dated 6th November 2013 the 2nd Respondent informed the Appellant's lawyers that they were instructed to offer FJD $ 600,000/- plus, such costs "*as may be determined to be reasonable by court" and* stated that, "*this offer is open until 5:00 p.m. on Monday 16 November (Fiji time)*", (emphasis added).

[16] The 2nd Respondent stated further that if this offer is not accepted, and if the judgment does not exceed this offer, it would seek indemnity costs from the Appellant from the date of this letter, on the basis of a Calderbank offer.

[17] By letter dated 6 November 2013, the Appellants lawyers rejected the offer of FJD$ 600,000.00, and made a counteroffer in the following terms:

"Your offer of FJ $ 600,000 plus costs as may be determined to be reasonable by the Court is not acceptable to our client. However, after further consideration we have been instructed to make a counteroffer of $ 650,000 plus costs to be determined by the court on a gross sum basis pursuant to order 62 Rule 7(4).

This offer is open until 4:00 p.m. on Thursday 7th November 2013 and is not negotiable other than as to any proposals as to costs. If the offer is not accepted, and our client obtains an evolve equal to or better than this offer, we will rely on this letter on the question of recovery of costs on a solicitor client fully indemnity basis in accordance with the principles in Calderbank v. Calderbank.

We trust good sense will prevail to obviate further unnecessary costs being incurred by our client."

[18] By letter dated 11 November 2013 the 2nd Respondent's lawyers replied rejecting the Appellant's offer but informed the Appellant's lawyers that they had been instructed to make a fresh offer of settlement of FJD $ 600,000.00, plus costs on a standard basis, to be taxed by the taxing officer of the High Court of Fiji, and the offer was open until 12 November 2013.

[19] It transpires that after the letter dated 11 November 2013 was sent, the Counsel for the parties had discussed the matter and arrived at a settlement.

[20] As a sequel to the said discussion, by letter dated 15 November 2013, the 2nd Respondent wrote to the Appellant's lawyers stating as follows:

"*We note that the matter is now settled on the following terms:*

1. *The Defendant within 21 days of the date hereof to pay a sum of FJ$ 600,000 to the Plaintiff by payment to AK Lawyers Trust Account <u>in full and final satisfaction of the plaintiff's claim for damages.</u>*
2. *The Defendant to pay the Plaintiff's costs in such amount or by such method as the <u>court considers reasonable.</u> In this regard it is agreed both the defendant and plaintiff may make such submissions as to the proper basis for the assessment of costs they may consider appropriate.*

3. *The settlement amount is not to be disclosed except as may be relevant and necessary in the application for costs.*
4. *The matter to be mentioned on 18th November 2013 with the court to be advised that the matter has* (sic) *settled with only the issue of costs to be determined.*
5. *A timetable to be agreed with respect to the determination of the issue of reasonable costs.*
6. *The defendant undertakes to use its best endeavours to have the cost assessment finalized as soon as reasonably practicable.*

   Please confirm that your understanding of the settlement accords with the above summary."

[21] Having heard parties both by way of oral and written submissions, the learned Judge delivered his Judgment on 3 July 2020, awarding to the Appellant, a sum of FJD $ 87,130.43 as costs, costs of $1,500.00 for the High Court proceedings.

[22] In arriving at the figure of FJD $ 87,130.43, the learned Judge reduced (i) a sum of $10,000.00 as tax costs, and (ii) a further sum of $10,000.00 for the Appellant's misconduct, guided by the judgment in **Molloy v Shell UK Ltd**. [2001] EWCA Civ 1272 (6 July 2001).

The grounds of appeal

[23] Aggrieved by the Judgment of the High Court, the Appellant has formulated 8 grounds of appeal which are set out below:-

1. *The Learned Judge erred in law and in fact in holding at paragraph 63 of the Ruling that the Plaintiff has also contributed a little to warrant some deduction in terms of his costs when:*
   (i) there was no conduct to warrant such a deduction; or
   (ii) in failing to provide any reasons as to why or how the deduction was warranted.

2. *The Learned Judge erred in law and in fact by failing to apply relevant facts and evidence in the analysis of costs [at paragraphs 60 to 64 of the ruling]. The relevant facts inter alia being:*

(i) *that the delay in settlement was caused by the Second Respondents as they initially commenced settlement talks only at $50,000.00 on 8th March, 2007;*

(ii) *that the Second Respondents contested liability throughout the proceedings and only conceded liability on 9th September 2013 (6 weeks before trial);*

(iii) *the contrary to the Second Respondent's allegations, the Appellant's instructions to ultimately settle at $600,000 plus costs did not justify that the claim was "overblown" and/or had any bearing on the value of the claim had it been fully litigated;*

(iv) *that the Second Respondents had amended their defence 6 years after the claim was filed and as held by the Learned Judge [at paragraph 28] this was "totally unnecessary".*

[1] The Learned Judge erred in fact [at paragraphs 43 to 45 of the ruling] by erroneously holding that:

(i) *"A letter dated 23 September 2013 from AK Lawyers is attached to Hazelman's affidavit. By that letter, AK Lawyers had responded to Haniff Tuitoga's offer of FJD$600,000 with a counter offer of FJD$1.5 million";*

(ii) *"Haniff Tuitoga replied on 04 October 2013 with displeasure at AK Lawyers insistence on the plaintiff's original settlement offer of FJD$1.5 million and unwillingness to negotiate";*

(iii) *"AL Lawyers responded on 06 November 2013 with a counter offer to settle at $650,000 plus costs on a gross sum basis".*

(iv) *"Haniff Tuitoga responded on 06 November 2013 with a fresh offer of settlement at $600,000 plus costs on a standard basis".*

When in fact the evidence before the Learned Judge was that:

(i) *On 29th August, 2013, the Second Respondents solicitors proposed $326,900.00. This was rejected by the Appellant's solicitors with a counter offer of $1.5 million by way of letter 23rd September, 2013 (this letter was not attached to Hazelman's affidavit);*

(ii) *On 4th October, 2013, the Second Respondent's solicitors rejected the counter offer of $1.5 million and expressed their client's intention to proceed to trial;*

(iii) *On 6th November, 2013, the Second Respondent's solicitors again sent another proposal which was in the sum of $600,000.00;*

(iv) *It was to this offer, the Appellant's solicitors made a counter offer of $650,000.00 on the same day.*

(v) *The parties ultimately settled at $600,000.00*

Such that it led to an adverse inference that the Appellant was guilty of exaggerating his claim and/or failing to settle at the earliest opportunity available.

[2] The Learned Judge erred in law and in fact by applying and/or erroneously applying the authority of Molloy v Shell UK Ltd [2001] EWCA Civ 1272 (6 July 2001) to allow a deduction of $10,000.00 for the Appellant's conduct when the facts and circumstances if this case are wholly distinguishable to Molloy (supra) on the following grounds:

(i) *The claim in Molloy's had been grossly and deliberately exaggerated by the Claimant;*

(ii) *The claim had been so grossly exaggerated that it was regarded to be an abuse of the Court's process and a manipulation of the civil justice system;*

(iii) *There was an element of fraud and dishonesty in Molloy's;*

(iv) *There was clear evidence in Molloy's to hold that the claim was fraudulently and dishonestly exaggerated.*

[3] The Learned Judge erred in law and in fact by failing to give sufficient weight or any weight at all to the Appellant's victory and the ultimate result of the case in assessing and determining the amount of costs entitled to the Appellant.

[4] The Learned Judge erred in law and in fact by not applying the principles enunciated in the leading authority on costs in Yanuca Island Ltd v Markham [2005] FJCA 67; ABU0092.2004S (11 November 2005) such that it led the Learned Judge to erroneously hold [at paragraph 56 of the Judgment] that 'costs are in fact sums payable for legal services' and that the Appellant's evidence of the medico-legal expenses were not 'solicitors fees' or 'litigation costs' thus rejecting the Appellant's entitlement of costs for medico-legal expenses;

[5] The Learned Judge erred in law and in fact by failing to provide sufficient reasons or any reasons at all for declining the legal fees for Eakin McCaffery Coz ("EMC"), the firm of solicitors in Sydney, when uncontested evidence was before the Learned Judge that:

(i) *EMC appointed AK Lawyers to pursue the Appellant's claim in Fiji on the Appellant's instructions;*

(ii) *AK Lawyers were the principle solicitors on record and EMC was engaged to provide logistical support to AK Lawyers as reflected in the proceedings and the bills of costs;*

(iii) Due to the nature and extent of the Appellant's injuries, the Appellant's treatment in Australia and the Second Respondents' heavily contesting liability throughout the proceedings, logistical support from EMC was imperative and necessary;

(iv) The Second Defendants had themselves engaged specialists in India and Australia.

Discussion of the grounds of appeal.

[24] The essence of grounds 1 and 4 is that that the learned Judge's reference to the Appellant's misconduct as the basis for the deduction of $10,000.00 is not borne out by reasons and was based on an erroneous reliance on the judgment in **Molloy v Shell UK Ltd.(***supra*).

[25] The essence of ground 2 is that the learned Judge failed to take into account the conduct of the 2nd Respondent in the form of initially contesting liability, delay in offering a settlement, and amending it's Statement of Defence six years after the Statement of Claim was file, which the learned Judge himself found was unnecessary.

[26] In grounds 3 and 5, the Appellant contends that in awarding costs, the learned Judge failed to factor in the misconduct of the 2nd Respondent, although he had found that he was 'guilty of some misconduct".

Grounds 1-6 of the grounds of appeal

[27] It must be observed at the outset that having entered a settlement out of court, the parties themselves agreed that they would submit only the issue of the award of costs for determination by court. The correspondence that passed between the parties showed that in the letter dated 6th November 2013, the Respondent contemplated reasonable costs. In the Appellants letter dated 6th November 2013, the lawyers state that they are willing to accept costs as determined by court on a "gross sum" basis under O. 62 r.7 (4) of the High Court Rules, 1988.

[28] When the determination of costs was placed before the learned Judge he was not aware of the sum that had been agreed between the parties as the settlement sum. However, His Honour considered as best as he could, the material before him in arriving at a determination.

[29] The Appellant's acceptance of a settlement shortly before the trial date, indicates that he had made an informed judgment that in the overall scheme of things, it was in his interest to accept the offer. Having come so close to the date of trial, unless it was his considered decision that the settlement of $600,000 was reasonable and fair, it is not necessary to presume that he was pressured or coerced into accepting it. The Appellant was well advised, and although he had been preparing for trial and had retained experts and foreign lawyers, he decided to accept the settlement offered.

[30] Once a party accepts a settlement, it would be improper to go behind that decision and demand that he be treated like a party who is awarded costs at the end of a fully heard trial. A party that elects to accept the settlement must be held to be bound by it. This is important not only in the interest of fairness, but also in the interest of the time of court, which must not be compelled to waste its resources on matters that could have been agreed upon by the parties. Once the parties submit to the jurisdiction of the court to decide on costs, they are bound by the decision of the court made after hearing all parties.

[31] I am not in agreement with the Appellant's argument that the learned Judge failed to give specific reasons for concluding misconduct on the part of the Appellant. Whilst the common law requirement of the duty to give reasons is based on fairness, what is needed is a fair explanation, enabling the affected party to know where he had gone wrong. In my view the learned Judge has taken great effort in assessing costs; he first tabulated in detail, the contents of the affidavits filed by the parties, analyzed the significance of the chronological sequence of events, and only then arrived at his conclusions. Although the Appellant complains that the learned Judge failed to articulate the reasons that reflect the misconduct of the Appellant, it is possible to glean from the judgment that the learned Judge formed the opinion that by repeatedly refusing the offers of the 2nd Respondent, the Appellant too contributed to delay and the aggregation of costs, and that he considered this to be misconduct. The learned

Judge made specific reference to the Affidavit filed on behalf of the 2nd Respondent by Shantelle Hazellman the contents of which were not rebutted by the Appellant. The learned Judge was therefore entitled to conclude as he did. I see no basis to consider his conclusions extreme or devoid of evidential basis.

[32] It cannot be denied that there was some delay in the Respondent offering a reasonable settlement, and indeed the learned Judge did observe that seven years and five months is a relatively long time to take to settle a case. Having said that, the learned Judge posed the question as to what would be a reasonable time frame to give an insurer to start and complete an investigation in order to decide whether or not to defend or settle a claim. What length of time in deciding whether to defend a claim, would be reasonable so as to amount to misconduct on the part of the insurer, inviting an award of indemnity costs? Clearly, it depends on all the facts and circumstances of the particular case.

[33] The learned Judge took the view that the insurer should be allowed time to investigate and form a position as to its contractual liability under the policy, as well as the insured's liability to a third party. He was entitled to seek a declaration as to whether or not it could avoid the policy on account of a suspected breach of the policy. Accordingly, the learned Judge was not prepared to categorize this as misconduct on the part of the 2nd Respondent.

[34] The learned Judge also considered the affidavit of Shantelle Hazellman filed on behalf of the 2nd Respondent, in which she deposed that the exorbitant claim maintained by the Appellant from the beginning, was the reason for the delay, and that the Appellant relented only in 2013, and that too, only at the 2nd Respondent's invitation. She said further that, had the Appellant been more accommodating earlier, this matter may have been settled earlier. As set out above, it is significant that the contents of her affidavit were not rebutted by the Appellant.

[35] The Appellant contends that despite the court stating that it would approach assessing costs by looking at the fees rendered by the successful party to its lawyers, and that it would make a discount on a fail-safe basis, the size of the plaintiff's victory, the nature and importance of the case and the affidavits filed outlining actual costs and

disbursements of the plaintiff, the learned Judge did not give sufficient weight to the Appellant's victory, the quantum of the settlement, and the ultimate result of the case. However, it is important to note that what the court in fact said was that it "*generally agrees with the approach*" that the court must start by looking at all the factors above. That did not place an obligation on the court to determine costs in this particular case, by ensuring all such criteria was factored into its decision. Thus, the Appellant's argument is without legal basis.

[36] To start with, in a civil suit, a "successful party" is one who has succeeded in his claim as pleaded, based on evidence adduced at a trial. In this case, there was no evidence adduced at a trial, and there was no judgment on the substantive claim which would necessitate the court then to assess costs. The "ultimate result" was an out of court settlement which the Appellant later sought to equate to a judgment. This is not countenanced by law.

[37] Thus, I am unable to agree that the settlement arrived at between the parties amounts to a "victory", in the sense sought to be made out by the Appellant who argues that he "won" his case because liability was conceded, and it took the other side so many years to make a reasonable proposal. It remained a settlement and not a judgment. More particularly it was a settlement out of court, and the court itself did not even know what the settlement sum was.

[38] The litigation relating to the initial denial of liability by the insurer has been considered by the learned Judge who found that the insurer was entitled to seek a declaration determining whether or not it was entitled to avoid liability on the basis of breach of the policy of insurance. As unfortunate as it must have been for the Appellant, I am not prepared to interfere with the decision of the learned Judge to exclude those proceedings from his assessment of costs.

[39] In the result, the 2nd Respondent did not concede liability as alluded to by the Appellant but decided to take on the defense of the insured. In doing so, the 2nd Respondent was entitled, like any defendant is, to ascertain the extent of his liability. After a decision was made to take on the defence, the 2nd Respondent considered the medical reports of the Appellant, as well as the medical reports submitted by the

Specialists engaged by the 2nd Respondents. The letter dated 29 August 2023 reflects the 2nd Respondent's acknowledgment that the Appellant was entitled to compensation for Pain and Suffering, Cost of Future Care, Loss of Interest on loss of Past Earnings, and loss of Future Earnings. Earnings. Whilst the offer of $ FJD 326, 900.00, may not have been an acceptable figure for a person who had suffered serious multiple injuries, in my view it was a reflection of the intention to settle and avoid litigation- by this date, it was 7 years since the action had been instituted, and 10 years since the accident had occurred. Colloquially put, a settlement was better late than never.

[40] The "delay" in arriving at a settlement cannot be attributed to the 2nd Respondent alone, because the correspondence and documents filed reveal that the 2nd Respondent had to consider the Appellant's Medical Reports obtained in Australia, and the 2nd Respondent was subjected to testing by Medical Consultants engaged by the 2nd Respondent. It is apparent that much time was spent on the medical assessment of the Appellant both in Australia and India, as well as the clarification of the Reports by the 2nd Respondent. Thus, the delay cannot be attributed to the 2nd Respondent alone and in these circumstances, could not have been regarded as misconduct on the part of the 2nd Respondent.

[41] Reflecting once more, on the correspondence between the lawyers just before the date of trial, indicates a sense of urgency on the part of the 2nd Respondent to settle. Even at that stage, a fair reading of the replies from the Appellant's lawyers indicates hesitation to settle. It is true that in the letter dated 6 November 2013, the 2nd Respondent kept the offer of the settlement open for only 10 days, and whilst at first blush it may seem too short a time frame, considering the overall circumstances of the communications between the parties, it was a reasonable time frame within which to require a response.

[42] Eventually, the Appellant did accept the settlement and agreed to allow the court to determine costs. It was only the basis of costs that was going to be determined by the court. The Appellant sought costs on a gross sum basis, and this is clear from the Appellant's lawyer's letter dated 6 November 2013. The 2nd Respondent sought costs on a reasonable basis to be determined by court. I am not persuaded that the learned

Judge erred in refusing to award as costs, the sums described as medico -legal expenses. For the reasons set out above, grounds 1, 2, 3, 4, 5 and 6 of the Appellant's appeal are dismissed.

Ground -7: Medico- Legal Expenses

[43] The essence of ground 7 is the failure of the learned Judge to allow the costs of the Appellant's Fiji Solicitors (FJD $ 107, 130.43), and Australian Solicitor's costs (AUD 307,682.82) and Medico- Legal Expenses (AUD 29,354.34).

[44] The Appellant contends that the court erred in failing to apply the principles in **Yanuca Pacific Recording Ltd. v Yates** [1997] FJCA 43 (14 November 1997) and in failing to provide sufficient or no reasons at all, for declining the legal fees of Eakin McCaffery Coz("***EMC***") when uncontested evidence was before the court.

[45] Firstly, it cannot be claimed that there was uncontested evidence because the case never proceeded to trial. Timothy John Eakin said in his affidavit sworn on 16 May 2014 that the settlement figure of $600,00.00 did not include the medico-legal expenses claimed under the headings C and D in the updated schedule of costs.

[46] The learned Judge considered the Updated Schedule of Costs filed with the Affidavit of Vincent John Adams Flynn, sworn on 16 May 2014, who produced an updated schedule of costs.

[47] Items C of the Schedule reflected accommodation and airfare costs for the Appellant's travel costs from Chennai, India to Sydney, Australia. The sum claimed was AUD$ 10, 015.84.

[48] Item D reflected Doctor's Consultation fees and medical assessments. This amounted to AUD $ 19,338.50.

[49] In refusing to award the sums under the headings C and D above, the learned Judge held that the said amounts claimed are in fact Special Damages and not costs because they do not relate to Solicitor's fees, nor are they litigation costs. He found that they

instead related to travel, accommodation and incidental expenses incidental to medical treatment.

[50] In regard to medical expenses under Heading D in the updated Schedule of Costs, the Appellant claimed Doctor's fees. However, there were no invoices submitted and this was adverted to in the submissions in the High Court. Even under this head, the learned Judge found that they did not comprise of legal costs. Legal costs would include costs incurred for the purposes of litigation. Invoice numbers were reflected under Heading D, but the invoices were not produced, and were all dated 2011 and 2012. The accident occurred in 2003 and the litigation commenced in 2006.

[51] The Appellant relies on the decision in **Ambaram Narsey Properties Ltd. v. Lautoka City Council** [2014] FJSC 18; CBV 3. 2014 (14 November 2014) where the court held that preparation of reports and obtaining of opinions for the purpose of litigation could be regarded as litigation costs rather than special damages. That case was a claim of assessing damages for damage caused to a building, and the need to seek the assistance of experts in that field and obtain their opinions. In that case the assessment of damages for the damage caused to the building was the central issue.

[52] Costs are awarded for reasonable or necessary expenses and disbursements. The figures relied upon by the Appellant were not supported by invoices nor were those claims and figures proved at a trial, the matter having been settled. In these circumstances, the learned Judge did not err in refraining from awarding the said sums as costs.

[53] The settlement out of court covered all heads of damages. In fact in the affidavit of Krishneel Patel relied on by the Appellant he states that the matter was settled as to liability and quantum of damages. I am thus unable to accept the Appellant's submission (in paragraph 5.3 of the written submissions filed on his behalf) that the "settlement had no reference to the damages claimed in the pleadings". Surely, the $600,000.00 can have been nothing else, but damages. And, that is why the parties agreed to have the court determine only the issue of costs. The learned Judge therefore, correctly rejected these items of expenditure in assessing costs. I see no reason to

interfere with the finding of the learned Judge in upholding the correct legal principle, Ground 7 of the grounds of appeal is therefore dismissed.

Ground 8- Fees for Overseas lawyers – EMC

[54] The Appellant relied on the case of **Yanuka Island v Markham** 2005 FJC 67 (11 November 2005). The learned Judge found that in his Affidavit of 12th May 2014, Eakin deposed that the plaintiff (the Appellant) had instructed his firm to pursue a claim for damages in Fiji, his firm then engaged AK Lawyers, the arrangement was that EMC would provide AK Lawyers the required logistical support from Sydney. He deposed that this was necessary because the plaintiff was hospitalized, treated and managed in Australia, and that his firm's actions in Sydney, were to be performed on behalf of the appointed solicitors on record in Fiji. The learned Judge however found that in the bill of costs from AK Lawyers to the Appellant, they refer to EMC as "your agent. Having considered the matters urged before him and the documents available to him, the learned Judge did not award the sum of AUD 307, 682.82 claimed for EMC, the Sydney law firm that was initially retained by the Appellant.

[55] Both learned Counsel had made detailed submissions at the hearing on the costs application. Although the learned Judge does not set out in detail the reasons for not awarding the costs claimed for the foreign solicitors, it is evident that he found that AK Lawyers were the Solicitors on record in Fiji and therefore extra expenses on retaining overseas legal assistance and Counsel could not be regarded as reasonable and necessary expenses in pursuing a claim for damages.

[56] The burden of proof remains on the Plaintiff to prove that the expenses incurred were reasonable as well as necessary. On this, the Appellant did not convince the learned Judge, nor was this point argued in appeal on behalf of the Appellant. There is no basis for this court to interfere with the decision of the learned High Court Judge, and therefore ground 8 of the grounds of appeal is dismissed.

[57] For the reasons set out above, the appeal of the Appellant is dismissed.

The 2nd Respondent's Notice

[58] The Respondent's Notice contends that the learned Judge erred in awarding costs on an indemnity basis, without reason to do so, and because it was not sought and pleaded in the Statement of Claim.

[59] There is no basis to award indemnity costs in a case in which the substantive claim between the parties was settled, and when it was not pleaded in the claim.

[60] Although the Respondent's notice challenges the award of indemnity costs, this matter was not argued before this court, and in the Written Submissions dated 26 January 2024, the Respondents state that the Appellant did not appeal against the deduction of $10,000.00 in the bill of A.K. Lawyers, which then reduced it to $97,130.43.

[61] The 2nd Respondent submits that it is evident that the learned Judge considered relevant factors in assessing the conduct of the Appellant and the correspondence between the lawyers for the parties. The 2nd Respondent submits that the learned Judge was reasonable in allowing a deduction of $10,000 given that the court found that the Appellant was also responsible for the delay.

[62] The 2nd Respondent did not make submissions in respect of the matters set out in the Respondent's notice, and in fact urged this court to uphold the judgment of the High Court.

[63] I see no reason to disturb the findings of the learned Judge and therefore dismiss the 2nd Respondent's Notice.

Winter, JA

[64] I agree with the judgment of Jameel, JA.

Orders of the Court:

1. *The Appellant's appeal is dismissed.*

2. *The Judgment of the High Court dated 3 July 2020 is affirmed.*

3. *The 2nd Respondent's Notice of appeal is dismissed.*

4. *The 2nd Respondent will pay to the Appellant the full sum of FJD $ 87,130.43 within 21 days of this judgment.*

5. *The Appellant will pay to the Respondent a sum of $3000.00 as costs, within 21 days of this judgment.*

Hon. Mr. Justice Filimone Jitoko
PRESIDENT, JUSTICE OF APPEAL

COURT OF APPEAL
FIJI

Hon. Madam Justice Farzana Jameel
JUSTICE OF APPEAL

Hon. Mr. Justice Gerard Winter
JUSTICE OF APPEAL