

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

**CIVIL ACTION NO: HBC 176 of 2008**

**BETWEEN** : **SYSTEM SOLUTIONS PTY LTD**  
**Plaintiff**

**AND** : **FIJI NATIONAL PROVIDENT FUND**  
**Defendant**

**COUNSEL** : Mr. N. Lajendra for the Plaintiff  
Mr. M. Khan & Mr. N. Pita for the Defendant

**Date of Hearing** : 26<sup>th</sup> July, 2013

**Date of Judgment** : 9<sup>th</sup> February, 2016

**JUDGMENT**

- [1] The plaintiff instituted this action claiming \$ 93,495.20 from the defendant for the damage caused to its stocks by negligently allowing the rainwater to seep into its stores. The plaintiff is in occupation of the building in question since 1991, as the tenant.
- [2] The case of the plaintiff is that towards the end of September 2005 there was heavy rain in Suva and the area where the building in question is situated was also affected by the rain. On the following day it was found that the plaintiff's warehouse had gone under water and the stock had been damaged.
- [3] The stock was insured with the New India Assurance Company and they engaged McLarens Young International to investigate into the incident.

However, the New India Assurance repudiated the claim of the plaintiff under clause 10 of the contract of insurance which reads as follows;

Excluding destruction or damage caused directly or indirectly by:

- (a) Water discharge or leaking from any pipe, water system or water main destroyed or damaged by or in consequence of hurricane and/or storm and/or gale;
- (b) Water discharge or leaking from any sprinkler or drencher installation or tank connected therewith;
- (c) Rainwater.

[4] According to the plaintiff the particulars of negligence of the defendant are as follows;

- (a) Failing to properly seal a hole at the base of the side of the wall;
- (b) Failing to use waterproof material to seal the hole;
- (c) Failing to properly check that water could ingress through the hole and enter the building;
- (d) Failing to foresee that PVC pipe travelling across the cemented area from the inspection chamber back-flowing, allowing water to collect in the said chamber and seep through the existing hole into the building; and
- (e) Failing to inform the plaintiff about the hole and the danger of water seeping into the building through the said hole.

[5] The defendant while denying the allegation that the damage was due to its negligence sought a dismissal of the claim of the defendant.

[6] As per the minutes of the pre-trial conference following are the agreed facts;

1. The plaintiff is a company engaged in the business of information communication technology and has its registered office at Provident Plaza 1, Level 3, Module 2, 33, Ellery Street, Suva.

2. The defendant is a statutory body, established under the Fiji National Provident Fund Act, (Cap 219) and has its head office at Provident Plaza Two, 33, Ellery Street, Suva.
3. The defendant is the registered proprietor of all the land situated at 263 – 269, Grantham Road, Raiwaqa, Suva being lot 49 on DP 3660 described in Housing Authority Lease 13/995.
4. On the said land the defendant has a building containing shops and office accommodation.
5. From approximately 1991 till to date the plaintiff has been in occupation of the building described as building No. 3 Suite Nos. 7, 8 and 9.

[7] The learned Judge who heard this case left the judiciary without delivering the judgment. When this matter was mentioned before me on 06<sup>th</sup> October 2015 the learned counsel for the parties informed Court that the judgment could be given on the evidence available on record. On an application of the learned counsel for the plaintiff, he was given an opportunity to make oral submissions. The learned counsel in the course of his submissions brought to the notice of the Court that the transcript of proceedings is incomplete but could not request a trial *de novo* for the reason that some of its witnesses are not available in Fiji.

[8] The initial issue for determination is whether the damage caused to the stock of the plaintiff was due to the negligence of the defendant.

[9] If a claimant wants to sue the defendant in negligence he will have to show four things:

1. that the defendant owed the claimant a duty of care;
2. that the defendant breached that duty of care;
3. that the defendant's breach caused the claimant to suffer some kind of loss; and

4. at least one of the losses that the defendant's breach caused the claimant to suffer is actionable.<sup>1</sup>

[10] When it comes to damage to property the claimant must establish that it was reasonably foreseeable that the defendant's action would result in property being damaged, and the claimant had a sufficient interest in the property at the time it was damaged as a result of the defendant's action.<sup>2</sup>

[11] The 1<sup>st</sup> witness for the plaintiff is its Managing Director, Mr. Abdul Kaleel. He has not been able to speak much about what in fact happened on the day of the incident which led to the institution of these proceedings. He relied on the report prepared at the instance of the insurance company. However, he has said that about a week before he saw some plumbers working on the inspection chamber outside the building.

[12] The two reports dated 14<sup>th</sup> October 2005 and 07<sup>th</sup> June 2006 prepared by McLarens Young International were tendered in evidence marked as 'P 18' and 'P 19' respectively. According to these reports McLarens Young International has not done any investigation on the water leakage but engaged Waterblasting and Painting Services to conduct the investigations.

[13] In the report 'P 18' it is stated as follows;

A PVC pipe which drains water from the hand basin was found to be broken into two pieces and slotted together in the wall where the pipe passes from the interior to the exterior and on the exterior surface of the wall, it had recently been cement plastered as the concrete was fresh and clearly visible.

Munaf has indicated water could have leaked from this pipe each time the hand basin was used, however, he was not aware of the fact that this hand basin is never used as employees use other toilet facilities in the building.

---

<sup>1</sup> Tort Law Nicholas J. McBride and Roderick Bagshaw, 4<sup>th</sup> Edition (2012) at page 92

<sup>2</sup> Tort Law Nicholas J. McBride and Roderick Bagshaw, 4<sup>th</sup> Edition (2012) at page 125

When the recently constructed inspection chamber was dismantled, another area of freshly applied cement plaster was found at the very base of the wall. Section of this was removed which revealed a hole extended through the thickness of the wall where it is assumed a pipe previously existed. Testing revealed water could flow through this hole onto the floor of the toilet area which is in very back corner of the building and from there dispersed across the floor of the two areas as, there is a door opening in the common wall between shops 7 and 8.

- [14] There are no new findings or materials in the report 'P 19'. Mr. Hughes was called by the plaintiff to testify on these two reports prepared by McLaren Young International. However, he was not the author of these two reports and he could only say that the signature found on these reports is of Mr. Sam Wetherall. Since there are no conclusive findings in these reports as to the seeping of water into the stores of the plaintiff, they are of no assistance to the Court in arriving at a finding as to the cause of the damage.
- [15] The report (P 22) prepared by Mr. Munaf of Suva Waterbalsting and Painting services Limited states as follows;

A possibility of leakage was from the outside wall where an inspection chamber was done up in order to trace for leakage, the inspection chamber and the base of the wall was removed. At the base of the wall there was new plaster, section of this was removed and a hole was found which went through the wall, where a pipe was previously and had been removed. I consider water may have flowed through this hole during the period of heavy rain.

Waste pipe from hand basin was also removed to check for reasons of new plaster on the outside with no changes in the inside and upon removal of concrete, it was seen that the pipe was damaged and broken into two pieces, slotted into each other and plastered and it is a possibility of leakage from this area into the floor of toilet when the

hand basin is used. However, I am told this hand basin is not used as employees of Systems Solution do not use this toilet area.

- [16] Mr. Munaf testified at the trial on behalf of the plaintiff. It appears from his evidence and the report that the water leakage into the stores could have happened in any of the two ways stated therein. Although Mr. Munaf stated in evidence in chief that he considered that the water may have flowed through the hole found at the base of the wall during the period of heavy rain, in cross examination he admitted that it was also a possibility that if the hand basin tap was left open for one whole night water could have been spilled over the hand basin.
- [17] He also said that the hole on the wall, he was talking about could not be seen from inside the building and they found it after removing the outside plaster of the wall.
- [18] Mr. Bali, witness for the defendant is a plumber by profession. The learned counsel for the defendant was attempting to prove by this witness that the water had collected inside the building due to over flowing of the hand basin. However, in cross-examination he admitted that it could have either been the overflowing of the hand basin or as a result of the heavy downpour.
- [19] Photograph 1 of 'P 23' shows the inspection chamber and newly done plastering on the wall above it. Photograph 2 of 'P 23' shows two openings on the wall and a broken pipe. The plaintiff's attempt was to establish that it was through these openings the water seeped into the building. But evidence adduced by the parties at the trial does not support this contention. If the new plastering was done before the rain it was not possible for the water to go through the wall and as elicited in evidence if there was no opening on the wall from inside the building the water cannot seep through the wall.
- [20] There is no evidence as to when this plastering was done and therefore the Court is unable to safely arrive at the conclusion that it was through these openings that the water seeped into the building.

[21] There are certain other matters which the plaintiff was required to explain. Firstly, it was only the plaintiff's stores that was affected by seeping water into the building and not the other shops on the same level, if the water leaked into the building through the opening referred to in the reports and by the plaintiff's witness in his evidence. Secondly, if the new plastering was done before the rain the water could not have come into the building. There is no evidence that it was done after the leakage of water into the building. The plaintiff's evidence is that he saw a plumber working there about two weeks before the incident. If these holes were there on the wall even before the rain water could have seeped into the building on every rainy day. The plaintiff's witness does not know exactly what the defendant's plumber was doing at the inspection chamber.

[22] It is therefore clear that the plaintiff has not been able to establish that the damage caused to his stocks was due to the negligence of the defendant or its servants. I accordingly make the following orders.

### ORDERS

1. The writ of summons of the plaintiff is struck out.
2. Taking all the circumstances of this case into consideration I make no order for costs.



Lyone Seneviratne

Judge

09.02.2016