

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

**CIVIL ACTION NO: HBC 325 of 2012**

**BETWEEN** : **DILIP KUMAR** and **JYOTSNA KUMAR** both of Suva trading  
as 'Binaco Textiles'.

**PLAINTIFFS**

**A N D** : **PARSHOTAM LAWYERS** (formerly known as Parshotam &  
Co.), Barristers and Solicitors of Suva (a firm)

**DEFENDANTS**

**BEFORE** : Justice Riyaz Hamza

**COUNSEL** : Mr. John Connors with Mr. Vijay Maharaj for the  
Plaintiffs  
: Mr. Devanesh Sharma with Mr. Vinit Singh for the  
Defendants

**Date of Hearing** : 18 July 2016

**Date of Ruling** : 23 January 2017

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**RULING**

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**Introduction and Background**

[1] This is an action instituted by the Plaintiffs by way of a Writ of Summons. The original Writ of Summons and Statement of Claim were filed on 12 December 2012.

[2] On 27 May 2014, Court granted the Plaintiffs leave to file an amended Statement of Claim. As per the said Amended Statement of Claim the Plaintiffs have stated as follows:

1. That the Defendants are and were at all material times a firm of Solicitors carrying on their practice at Level 2 Mid City Building, Waimanu Road, Suva.
2. At all material times the Plaintiffs were the tenants and occupiers of a bulk store situated at 49, Dabea Circle, Kalabo Subdivision and were owners of the goods stored therein.
3. On 10 September 1994, the Plaintiffs' warehouse was damaged by a fire in the circumstances that gave the Plaintiffs a right of compensation under the Fire Policy and/or right of action against their Insurance Company (The National Insurance Company of Fiji and now known as Tower Insurance).
4. On or about January 1995 the Plaintiffs instructed and retained the Defendants who agreed to act as Solicitors for the Plaintiffs in making a claim and taking proceedings against the Insurance Company for compensation under the insurance policy.
5. It was an implied term of the said agreement and it was also the duty of the Defendants to exercise all due care, skill and diligence in and about the prosecution of the said claim and proceedings against the said Insurance Company.
6. In breach of the said term or the said duty or by reason of negligence on the part of the Defendants, their servants or agents, the Defendants failed to exercise any or any due skill or diligence in or about the prosecution of the said claim or proceedings.
7. The particulars of negligence has been described as failure to warn or advice the Plaintiffs that the limitation period in terms of the insurance policy within which an action for prosecution of the right in relation to a claim for compensation pertaining to damages to the Plaintiffs' said property by fire

was 12 months from the happening of the loss or damage, in this case from 10 September 1994; and failure to commence an action to prosecute the right within 12 months from the happening of the loss or damage, which was on or before 10 September 1995; and thereby causing or permitting the said claim of the Plaintiffs against the Insurance Company to be statute barred.

8. And accordingly the Plaintiffs claim damages, interest pursuant to the Law Reform Miscellaneous Provisions (Death and Interest) Act, Costs and such further and other reliefs that Court may grant in the circumstances of the case.

[3] The Defendants filed an Amended Statement of Defence and Amended Counterclaim on 10 December 2014. The Plaintiffs filed a Reply to the Amended Statement of Defence and Amended Defence to Amended Counterclaim on 19 December 2014.

[4] On 2 February 2016, the Defendants filed a Summons to Strike Out this action. This was said to be in terms of Order 18, Rule 18 of the High Court Rules 1988, Order 33, Rule 3 of the High Court Rules 1988 and Section 4 of the Limitation Act (Chapter 35). The Summons is supported by an Affidavit deposed to by Subhas Chandra Parshotam, a Partner of the Defendants law firm.

[5] The basis on which the Defendants were moving for the action to be struck out and dismissed was that the action was instituted beyond the time permitted under the Limitation Act (Chapter 35 of the Laws of Fiji) for the Plaintiffs to commence the said action.

[6] On 11 February 2016, the First Named Plaintiff, Dilip Kumar, filed an Affidavit opposing the Strike out application. Subhas Chandra Parshotam filed an Affidavit in Reply, on 22 February 2016.

[7] The matter came up for hearing before me on 24 February 2016. On the said day the Counsel for the Plaintiff took up an objection that the latter Affidavit filed by Subhas Chandra Parshotam, raised several issues of fact and for that reason the Plaintiffs would require to cross examine him.

- [8] However, this matter was subsequently resolved, with the Plaintiffs and the Defendants filing several further Affidavits in support of their respective legal positions.
- [9] Subsequently, on the 19 April 2016, the Plaintiffs filed a Summons, and with the permission of Court an Amended Summons (on 29 April 2016), seeking leave to amend their Reply to Defendants Amended Statement of Defence and Counterclaim, filed on 19 December 2014. The said Amended Summons was filed pursuant to Order 20, Rule 5(1) of the High Court Rules.
- [10] Thus when the matter came up before me for hearing on 13 May 2016, there were two pending interlocutory applications before Court.
- (i) The Summons to Strike Out, which was filed by the Defendants on 2 February 2016; and
  - (ii) The Amended Summons to amend their Reply to the Defendants Amended Statement of Defence and Counterclaim, which was filed by the Plaintiffs on 29 April 2016.
- [11] The Counsel for the Plaintiffs submitted that the Amended Summons filed by the Plaintiffs should be taken up for hearing first, whereas the Counsel for the Defendants, disagreed and, submitted that the Summons to Strike Out filed by the Defendants should be taken up for hearing first.
- [12] Since there was no agreement on this issue, Court called upon both Counsel for the Plaintiffs and the Defendants to satisfy Court as to whose application should be taken up for hearing first.
- [13] On 17 June 2016, this Court made a Ruling that both pending interlocutory applications would be taken up for determination at one and the same hearing. The application filed by the Defendants for striking out would be taken up for hearing first. The Counsel for the Plaintiffs would be at liberty to make his submissions in response to the application for striking out and at the same time, support the

Plaintiffs' application made by way of Amended Summons. The hearing would proceed in that order until its conclusion. At the end of this hearing the Court would make one Ruling covering both applications.

- [14] Accordingly the hearing of both interlocutory applications was taken up for hearing before me on 18 July 2016. Both Counsel for Plaintiff and Defendant were heard. The parties also filed detailed written submissions, and referred to several case authorities, which I have had the benefit of perusing.

**The Summons to Strike Out filed by the Defendants**

- [15] The Defendants have filed the Summons for strike out in terms of the provisions of Order 18, Rule 18(1) of the High Court Rules 1988. The Rule is reproduced below:

*18(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –*

*(a) It discloses no reasonable cause of action or defence, as the case may be;*

*or*

*(b) It is scandalous, frivolous or vexatious; or*

*(c) It may prejudice, embarrass or delay the fair trial of the action; or*

*(d) It is otherwise an abuse of the process of the court;*

*and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*

- [16] The Summons is supported by an Affidavit deposed to by Subhas Chandra Parshotam. The contents of the Affidavit can be detailed as follows:

1. He states that he is the partner in the firm of Parshotam Lawyers, the Defendants in this case. The other partner in the firm is Satish Parshotam.

2. The instant action was filed by the Plaintiffs against the Defendants on 12 December 2012.
3. This Affidavit is being made by him for an Order that the said action be struck out and dismissed on the basis that action was brought beyond the time permitted under the Limitation Act for the Plaintiffs to commence the said action.
4. At all material times, the Plaintiffs were tenants and occupiers of a bulk store situated at 49 Dabea Circle, Kalabo Subdivision, Nasinu.
5. On 10 September 1994, there was a fire at the said premises.
6. The Plaintiffs held a policy of Insurance No. XCF001 with the National Insurance Company of Fiji Limited (now known as Tower Insurance (Fiji) Limited).
7. The Defendants, through Kikoo Kapadia then of Suva, Chartered Accountant, were instructed to act for the Plaintiffs to make a claim against the Insurance Company for the loss allegedly suffered by them as a result of the fire.
8. On 18 September 1995, the Defendants filed an action on behalf of the Plaintiffs against Tower Insurance in the High Court of Suva, by way of a Writ of Summons (Civil Action No. 424 of 1995S), where damages were sought for the loss. A copy of the said Writ of Summons has been annexed marked "A". A copy of the related Statement of Claim, dated 16 April 1997, has been annexed marked "B".
9. On 19 May 2006, the High Court determined that this action was barred in limine. A copy of the Judgment is annexed marked "C".
10. The Plaintiffs appealed against this Judgment to the Court of Appeal. On 30 July 2008, the Court of Appeal dismissed the appeal. A copy of the Judgement of the Court of Appeal is annexed marked "D".
11. The Plaintiffs appealed against this Judgment to the Supreme Court. On 9 May 2012, the Supreme Court dismissed the appeal. A copy of the Judgment of the Supreme Court is annexed marked "E".

12. The instant action was commenced by the Plaintiffs on 12 December 2012. The claim under the said action is being defended by the Defendants.
  13. He states that he verily believes that the Plaintiffs' course of action against the Defendants did not accrue within 6 years before the commencement of the said action, namely 6 years from 10 September 1995. In other words the date by which the Plaintiffs ought to have brought the said action was 9 September 2001.
  14. To continue with the said action without determination of the issue of limitation of proceedings would only put the parties to unnecessary cost and use of resources.
- [17] The First Named Plaintiff, Dilip Kumar, filed an Affidavit opposing the Strike out application. The contents of the Affidavit can be summarized as follows:
1. He submits that the Defendants were at all times prior to the 11 May 2012, acting on behalf of his wife (the Second Named Plaintiff) and himself.
  2. The Defendants continually advised that they had a good chance of success in their action against the Insurers in the High Court and subsequent appeals to the Court of Appeal and Supreme Court.
  3. It was not until after judgment was delivered by the Supreme Court that the Defendants advised the Plaintiffs to seek "alternative legal advice on this matter as we (the Defendants) perceive the possibility of a conflict of situation arising." This was said to be done by letter dated 11 May 2012. A copy of the said letter has been annexed marked "A".
  4. He deposes that at no time was he advised that any action had to be commenced against the Defendants by 9 September 2001 and all times he relied on the advice given to him by the Defendants.
  5. The delay in commencing action against the Defendants was due to their failure to give him advice at an earlier time that he should seek independent legal advice due to a possible conflict of interest.

6. Accordingly, First Named Plaintiff states that the cause of action against the Defendants arose only on 11 May 2012, and that the limitation period runs from that date.
7. He concludes his Affidavit by stating that it is unconscionable for the Defendants to seek to rely on their conduct to deny the Plaintiffs a right of action against them.

[18] Section 4(1) of the Limitation Act (Chapter 35 of the Laws of Fiji) is reproduced below:

4.-(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-

(a) *actions founded on simple contract or on tort;*

(b) *actions to enforce a recognizance;*

(c) *actions to enforce an award, where the submission is not by an instrument under seal;*

(d) *actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:*

Provided that-

(i) in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and

(ii) nothing in this subsection shall be taken to refer to any action to which section 6 applies.



[19] It is clear from the above that actions founded on simple contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

[20] Thus it is imperative to determine as to when the cause of action accrued in the instant case.

[21] The Counsel for the Plaintiffs have cited the cases of **Waltons Stores (Interstate) Ltd v. Maher**, (1988) 164 CLR 387; **The Commonwealth v. Verwayen**, (1990) 170 CLR 394; and **Hawkins v. Clayton**, 164 CLR 539.

[22] In *Hawkins v. Clayton* it was held:

*"If a wrongful action or breach of duty by one person not only causes unlawful injury to another but, while its effect remains, effectively precludes that other from bringing proceedings to recover the damage to which he is entitled, that other person is doubly injured. There can be no acceptable or even sensible justification of a law which provides that to sustain the second injury will preclude recovery of damages for the first. It would, e.g. be a travesty of justice and common sense if the law provided that a cause of action lay for damages for false imprisonment but then went on to provide that that cause of action would be lost if the false imprisonment continue for six years after the cause of action first accrued.*

*Likewise, it would be a travesty of justice and common sense if the law imposed a duty upon a solicitor to take positive steps to inform a third person of the contents of a document of which the solicitor was alone aware and then provided that any cause of action against the solicitor for damage caused by a negligent failure to perform that duty would be lost if the negligence continued for six years."*

[23] In this regard the Counsel for the Defendants referred to the case of **Singh v. Rajkumari**, [1969] 15 FLR 107 (27 June 1969); and two other decisions of the Master of the High Court.

[24] Considering all the facts and circumstances of this case, this Court is of the opinion that the cause of action against the Defendants arose only on 11 May 2012, at the point of time when the Defendants advised the Plaintiffs to seek alternative legal advice on the matter. This Court cannot permit the Defendants to seek shelter behind its own conduct to defeat the claim made by the Plaintiffs. Thus the limitation period would only commence from 11 May 2012.

[25] Accordingly, the Summons for strike out in terms of the provisions of Order 18, Rule 18(1) of the High Court Rules 1988, made by the Defendants is dismissed.

**The Amended Summons filed by the Plaintiffs to amend their Reply to the Defendants Amended Statement of Defence and Counterclaim**

[26] The Amended Summons filed by the Plaintiffs is in terms of Order 20, Rule 5(1) of the High Court Rules, which reads as follows:

*5(1) Subject to Order 15, Rules 6, 8 and 9 and the following provisions of this Rule, the Court may at any stage of the proceedings allow the Plaintiff to amend his Writ, or any party to amend his pleading, on such terms as costs or otherwise may be just and in such manner (if any) as it may direct.*

[27] As per the Amended Summons the Plaintiffs are seeking leave to amend their Reply to Defendants Amended Statement of Defence and Counterclaim, filed on 19 December 2014, by adding the following paragraph after paragraph 3 of the said Reply:

(4) In a specific reply to paragraph 7(b) of the Defendants amended Statement of Defence filed on 10 December 2014 the Plaintiffs say:

If which is denied, the Plaintiffs' claim is barred by Section 4 of the Limitation Act then it was due to the negligence on the part of the Defendants particulars of which are as follows:-

- (i) Failure to advise the Plaintiffs that any action against them had to be taken within 6 (six) years computed from 10 September 1995;
- (ii) Failure to advise the Plaintiffs to seek an independent legal advice before the expiration of the Limitation period with respect to any action against them.

[28] The Counsel for the Plaintiffs referred to several case authorities in support of their application to amend their Reply to Defendants Amended Statement of Defence and Counterclaim.

[29] In the case of **Fiji Electricity Authority v. Balram & Others**, (1972) FLR 18 (3 March 1972) it was held by the Supreme Court of Fiji that “an amendment to pleadings may be permitted by the Court at any stage of the proceedings for the purpose of determining the real question in controversy and, if it can be made without injustice to the other party it should be allowed however late, and however negligent or careless may have been the first omission.”

[30] Counsel also referred to **Ambaram Narsey Properties Limited v. Mohammed Yakub Khan & Others**, (2001) 1 FLR pg 283; **Rene Wurzel v. Minika Tappen Management Limited**, (2001) 1 FLR, pg. 275; **Ahmed v. Ibrahim**, [2002] FJCA 74; **Lami Investments Limited v. Kelton Investments Limited**, Civil Appeal Case No. ABU 60 of 2013 (26 February 2016) and **Shiu Ram v Carpenters Fiji Limited**, [2015] FJHC 711.

[31] In **Hari Prasad v. Muni Prasad and others**, Civil Appeal Case No. ABU 53 of 2004S (15 July 2005), it was held that “It is an established principle that if a pleading can be amended to meet a strike out application, then the discretionary power should not be exercised.....”

[32] The Counsel for the Defendant cited the cases of **Herbert and Another v. Vaughan and Others**, [1972] 3 All ER 122; **Maridive and Oil Services (SAE) and another v. CNA**

**Insurance Co (Europe) Ltd**, [2002] 1 All ER (Comm) 653, [2002] 2 Lloyd's Rep 9; and  
**Milburn Services Ltd v. United Trading Group (UK) Ltd**, 52 ConLR 130

[33] Considering all the above, this Court is of the view that application made by the Plaintiffs to amend their Reply to Defendants Amended Statement of Defence and Counterclaim should be allowed.

[34] Since the application for amendment has been made at a late stage in these proceedings, the Court would be ordering costs to be paid by the Plaintiffs to the Defendants.

[35] Accordingly, I make the following Orders:

#### **ORDERS**

1. The Summons for strike out in terms of the provisions of Order 18, Rule 18(1) of the High Court Rules 1988, made by the Defendants is dismissed.
2. The Defendants shall pay the Plaintiffs costs summarily assessed at FJD \$1,000.
3. The application made by the Plaintiffs to amend their Reply to Defendants Amended Statement of Defence and Counterclaim is allowed.
4. The Plaintiffs shall pay the Defendants costs summarily assessed at FJD \$1000.
5. Since both the Plaintiffs and the Defendants have been ordered costs in the sum of FJD \$1000 to be paid to each other, the said costs can be set off by the parties.

Dated this 23<sup>rd</sup> day of January 2017, at Suva.



  
Riyaz Hamza

**JUDGE**

**HIGH COURT OF FIJI**