IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 144/2011

BETWEEN	**SALESH KUMAR PRASAD** of Huntly, New Zealand, businessman **PLAINTIFF**
AND	**RAJEND PRASAD** t/a Nadi Drafting House, Nadi, draftsman **FIRST DEFENDANT**
AND	**ASHOK KUMAR BALI, SHRI PRASAD, PRITH PAL SINGH** t/a Spac Investments, building contractors. **SECOND DEFENDANT**
AND	**DEO & ASSOCIATES LIMITED** of Nadi, Engineers **THIRD DEFENDANT**

APPEARANCES	:	Ms R Lal for the Plaintiff Mr Naidu & Mr Daveta for the First Defendant Mr Roopesh Singh for the Second Defendant Mr Ronal Singh for the Third Defendant
DATE OF HEARING	:	29 March 2021
DATE OF RULING	:	29 March 2021

RULING

1. This matter was set down for a trial to commence today. On Thursday 25 March the plaintiff filed an application to have the plaintiff's evidence taken remotely. Because of the urgency of the matter it was called before me at 2.30 that afternoon.

2. The basis of this application was that the plaintiff resides in New Zealand, and because of the current Covid-19 related quarantine requirements for both Fiji and New Zealand, for him to attend at the trial would require him to be away from his business in New Zealand for so long that it would create an unreasonable hardship for him.

3. No proposals were made for the taking of Mr Prasad's evidence in New Zealand, no steps had been taken, nor thought apparently given to the logistical difficulties of this (for example to ensure that the plaintiff had available to him in New Zealand a set of all documents that were to be produced at the trial and on which he might be questioned), and it was quite clear that even if the application was declined, the plaintiff would not be able to get to Fiji and be out of quarantine in time for the trial.

4. During the course of discussion with counsel on Thursday afternoon it emerged that the plaintiff's expert witness was also not available to attend trial for health reasons. I adjourned both the application for remote taking of evidence, and any issue about adjournment of the trial, to be dealt with before me on the following Monday, the day the trial was due to commence.

5. On Friday 26 March the plaintiff's solicitors filed an application for adjournment of the trial, on the basis that Mr Hamendra Lodhia, the plaintiff's expert engineering witness (essentially the main witness for the plaintiff) had health issues that prevented him from giving evidence. These issues had existed since October 2020 (the matter was set down for trial on the 17th September 2020), but apparently the solicitors only found out about Mr Lodhia's difficulties the week before the trial was due to commence. I find this incredible. In a matter such as this I would have thought that the plaintiff's solicitors and the chief expert witness would be in more or less constant contact in the days leading up to the trial. The fact that they were apparently not does not suggest that the plaintiff and his solicitors were properly prepared for the trial.

6. When the matter was called before me today, counsel for the plaintiff focussed on the application for adjournment, rather than the application for remote taking of evidence. This is sensible and understandable. It is clear that if the evidence is to be heard remotely, much more planning and thought will need to be put into how the plaintiff's evidence is to be presented, including from where, and what resources need to be organised to have the evidence taken in this way. That will take time. The more immediate issue was whether the plaintiff would have that time, or whether the application for adjournment should be refused.

7. It is clear that refusing the adjournment will effectively put an end to the plaintiff's claim. The claim arises from events that took place in 2007, and if it is struck out because the plaintiff cannot present his evidence, he will not be able to re-issue the claim, or at least, the defendant's will be entitled to plead the Limitation Act in defence of any new proceedings. As a general rule the court prefers to decide cases on their merits, rather than strike them out for breach of technical or other requirements. That is particularly so where the plaintiff is not otherwise in breach of any court order, or has not acted contemptuously, and where there is not evidence of prejudice to the other parties.

8. It is true that the lateness of the plaintiff's application is such (counsel for the third defendant said he had only received the adjournment application this morning) that the other parties have not had an opportunity to present evidence of prejudice, but on the other hand, none of counsel for the other parties asked for more time to reply to the applications. The focus of their opposition to the application for adjournment was more on the lateness of it than because their clients are prejudiced by the delay in a manner that cannot be addressed by an order for costs.

9. After hearing submissions I took time to review the file. I was particularly interested in the history of the proceedings, and to see whether the plaintiff has been guilty of earlier delays, such that he should not receive further indulgence from the court.

10. The court file shows that this matter was filed in September 2011, and was initially certified for hearing in November 2015. In the week before the hearing the solicitors (not the current solicitors) for the plaintiff sought an adjournment, apparently because of issues related to discovery. That adjournment was consented to by the other parties, on the basis that the plaintiff agreed to pay each of them costs of $850.00 on the adjournment. The file was then referred back to the Master for further preliminary steps, before it was set down again for a hearing before Mackie J in May 2019. That trial was vacated because Justice Mackie had left the Fiji bench.

11. Thereafter it appears that the parties agreed to mediation, and there was a delay while they sought to organise a mediation. It is not completely clear what then happened, but it seems that the mediation did not proceed. This may have been because of the intervention of Covid in March 2020, or there may have been other reasons, but in September 2020 I set the case down for trial in March 2021. There was discussion before that happened about the possibility that the plaintiff's evidence might need to be taken remotely, but obviously nothing was done about that until the trial was imminent.

12. In the end, by a fine margin, I am not persuaded that the plaintiff's (or his adviser's) conduct has been such that his case should be struck out. While there was an earlier adjournment, that was agreed to and costs were ordered, and I assume paid. The following adjournment in May 2019 occurred through no fault of the plaintiff, and of course the plaintiff cannot be blamed for the difficulties created by the Covid pandemic (although – for reasons stated – I certainly would have expected him to have handled the matter more efficiently). I will therefore grant an adjournment.

13. However, the other parties are entitled to costs for wasted preparation for the trial, and I think that the level of costs should reflect the extreme dissatisfaction of the court about the lateness of the applications, and the apparent lack of thought put into the matter earlier than the week before the trial was due to commence.

14. The trial is vacated. The plaintiff will still need to pay the court hearing fees for the three day trial (it is too late to allocate the time to other matters). The plaintiff will also pay costs of $4,000 to each of the 1st and 3rd defendants (the 2nd defendant may have settled its dispute with the plaintiff, did not spend much time on preparation for the trial, and does not seek costs). These costs are to be paid by the plaintiff before the next mention date.

15. The case is adjourned for mention to the 20th April 2021 for the plaintiff to decide whether he wishes to continue with his application for remote taking of evidence. I would make the point that the expense of organising this, which will need to be met by the plaintiff, at least in the first instance, may mean that it is easier and cheaper for him to come to Fiji for the trial, leaving aside the likely ability to present his

evidence here more effectively than via remote link to New Zealand. I expect on that date to be able to allocate a new trial date, when both the plaintiff and Mr Lodhia are available to give evidence.

16. At the next mention date I will also make directions for preparation of a combined bundle of documents. There is no reason why the parties cannot co-operate to produce a single bundle of all documents that all the parties are relying on at trial. This will avoid the duplication and sheer inconvenience of dealing with multiple bundles, often containing identical documents, in different order and differently organised. The documents should be in date order, and the bundle should be paginated and indexed. If there are issues about the admissibility of any documents they can be dealt with at the hearing. The bundle should not of course contain without prejudice documents relating to settlement that the court should not see. The plaintiff will be responsible for organising this, and counsel for the other parties can let the plaintiff's solicitors know well in advance of the new trial date what documents they wish to include in the bundle. I will not be particularly sympathetic to the admission into evidence of documents that are not in the bundle.

A.G. Stuart
Judge

At Lautoka this 29th day of March 2021

SOLICITORS:
Lal Patel Bale Lawyers for the Plaintiff
Pillai Naidu & Associates for the 1st Defendant
Patel & Sharma for the 2nd Defendant
Munro Leys for the 3rd Defendant