IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 16 of 2022

BETWEEN : **A K LAWYERS** a partnership law firm registered under the Companies Act having its principal place business at Unit C4, Port Denarau & Retail Commercial Center, Port Denarau, Nadi.

PLAINTIFF

A N D : **SANDHYA JOGIA** of Apartment No. 11, Prime Apartments, Kennedy Avenue, Nadi, Domestic Duties.

DEFENDANT

Appearances: Mr. C. B. Young for the Plaintiff
Mr. D. S. Naidu with Kunal Chand for the Defendant
Date of Hearing: 17 May 2023
Date of Ruling: 18 May 2023

RULING

INTRODUCTION

1. The plaintiff, a firm of solicitors operating under the name and style of AK Lawyers, filed an Originating Summons on 21 January 2022 against a former client for some unpaid costs. The former client, namely Ms. Jogia, had retained AK Lawyers for some legal services and representation in relation to a lucrative divorce settlement and other related ancillary processes. The details of these retainers are not important at this time as I am now only dealing with a preliminary issue before the hearing proper begins – later today.

2. What I have been asked to determine at this time is – whether the plaintiff or the defendant should begin its case at the hearing of the Originating Summons.

3. It is important to note at the outset that AK Lawyers and Ms. Jogia were each granted an Order last year, on their respective applications which they filed pursuant to Order 38 Rule 2(3) of the High Court Rules 1988.

4. The effect of those Orders is to compel certain named deponents in these proceedings - to attend Court on the date of hearing – in order that they be cross-examined on their affidavits.

PLAINTIFF'S ARGUMENT

5. Mr. Young's submits that the defendant should begin their case first given the following:

   (i) the defendant does not deny that AK Lawyers di in fact render her legal services

   (ii) the defendant admits that she owes legal fees to at least $47,077.50

DEFENDANT'S ARGUMENT

6. The defendant's argument, as I understand it, is structured as follows:

   (i) at the hearing of an Originating Summons process, the plaintiff normally presents their case first by making submissions on the affidavits filed.

   (ii) after the plaintiff has presented their case, the defendant then presents their case in the same manner.

   (iii) after the defendant has presented their case, the plaintiff may then make submissions in reply

   (iv) the above order is premised on the thinking that the plaintiff who files a claim must bear the burden or the onus of proving that claim.

   (v) it is only after the plaintiff has presented evidence which tends to prove or establish their case – when the burden will then shift to the defendant.

   (vi) otherwise – to require a defendant to refute the plaintiff's claim in the first instance, without the plaintiff having led any evidence to support his case - has the potential to yield the awkward result that a defendant who fails to refute a claim thereby proves the plaintiffs case.

7. The defendant also relies on **Credit Corporation v Khan** [2009] FJHC 203; HBC 334.2000L (11 September 2009) which the defendant summarizes as follows in their submissions:

> Here the Plaintiff applied under Order 35 of the High Court Rules 1988 for the Defendant to begin first but due to the Defendant in Paragraph 7 of its pleadings stating that the contents agreement was not explained to him and that Credit Corporation had misrepresented the correct position….the Learned Judge ordered the Plaintiff to begin first.

COMMENTS

8. I have read the brief written submissions and the case authorities filed by both counsel. The following I extract from these:

   (i) indeed, as the defendant contends, and which is not really in dispute, the plaintiff normally presents their case (submissions) first at the hearing of an Originating Summons process, followed by the defendant, and the plaintiff in reply.

(ii) I agree that it is only after the plaintiff has presented evidence which tends to prove or establish their case – when the burden will then shift to the defendant.

(iii) having said that, there are instances where the Court may require the defendant to present their case first. This will usually happen where the Court forms the view that the burden or the onus of proof has shifted from the plaintiff to the defendant.

(iv) usually, the court will form that view that the onus or the burden has shifted – from concessions or admissions of material facts made by the defendant.

(v) for example, in **Intercities Buses Services Ltd v Haroon's General Hardware Store** [2017] FJHC 487; HBC48.2012 (3 July 2017), such a concession was made in the defendant's pleadings led Mr. Justice Ajmeer to the view that the burden had shifted to the defendant and that accordingly, the defendant should begin their case.

(vi) similarly, in **Standard Concrete Industries Ltd v JP Bajpai and Company Ltd** [1994] FJHC 177; Hbc0271d.92s (28 November 1994), concessions pleaded in the statement of defence led Mr. Justice Byrnes to order that the defendant should begin their case.

(vii) upon closer examination of the English case authorities cited by Byrne J in **Standard Concrete Industries Ltd**, it would appear that there are no strict rules involved.

(viii) rather, it is all about *"what justice to the parties requires"* (as per Coleridge J in Scott v. Lewis [1836] EngR 534; (1836) 7 C & P 347 at 349) and *"'what is the fair mode of trying that which is shown to be the substantial matter ..."* (Brett, L.J. in **Thomson v. South Eastern Railway Co.** [1882] UKLawRpKQB 46; (1882) 9 Q.B.D. 320.)

9. It appears that, in this case, AK Lawyers are relying on (i) the Costs Agreement it signed with Ms. Jogia and, alternatively, (ii) a Bill of Costs which was rendered to Ms. Jogia and which is annexed in the affidavit of Ms Samantha.

10. At paragraphs 7 and 8 of his submissions, Mr. Young submits as follows:

7) The Defendant then refers to Credit Corporation (Fiji) Ltd v Khan [2009] FJHC 203; HBC 334.2000L case saying that the contents of that agreement was not explained to the Defendant and, therefore, the Judge ordered the Plaintiff to begin first. It appears (without the benefit of judgment) (which was not supplied by the Defendant) that Credit Corporation Ltd was relying substantially on the existence of that agreement and contents of the same to substantiate its claim against the Defendant. Hence, it is understandable why the Judge ordered the Plaintiff to begin first because reference was made to the fact that Credit Corporation (Fiji) Ltd's agreement was explained to the Defendant and the Defendant denied that this was so.

8) The Defendant then seems to submit that the same issue has been raised with regards to the Cost Agreement in these current proceedings. However, the Plaintiff's case does not rely solely on the Cost Agreement. In fact, the Plaintiff's case can be substantiated without determining the fate of the Cost Agreement. Even if the Cost Agreement was to be set aside for whatsoever reason, the Plaintiff's claim is for attendances by the law firm and hence, its claim is based on

the bill of cost which was submitted as per annexure "NS-6" of Nilema Samantha's Affidavit as per letter of 13 August 2021 with itemized bill of cost in the Affidavit filed on 21 January 2022 for the amount of $214,3645.22.

11. Should the plaintiff be put to an election – so the defendant can at least know which of the two she should address?

BILL OF COSTS – WHICH PARTY BEARS THE ONUS?

12. In **Bailey v IBC Vehicles Ltd** 1998 3 ALL ER 570, the view was expressed that the signing of the Bill of Costs by a legal practitioner is sufficient proof for the client (paying party) that costs claimed in the Bill are accurate and that the legal practitioner is *prima facie* entitled to them costs.

13. It appears that the underlying principle was that – since the legal practitioner is an officer of the court – the Bill which he signs is *prima facie* to be accepted as accurate.

14. Of course, if the Bill turns out to be inaccurate, then that would be a disciplinary issue for the practitioner. Hence, on that logic, the onus is on the client (paying party) to place some reasonable doubt on the Bill of Costs rendered.

COST AGREEMENTS

15. When it comes to Cost Agreements, in Fiji, section 77 (1) of the Legal Practitioners Act of course gives a lawyer the freedom to make such an agreement with his or her client.

16. When read between the lines, the provisions of the Act do appear to endorse the sanctity of such an Agreement. This means that the paying party (client) must honor the Agreement. This means that the Court should not easily release a paying party from the Agreement.

17. Such a Costs Agreement will be about:

(i). the amount payable
(ii). for the whole or any part or parts
(iii). of any past or future services fees, charges or disbursements
(iv). in respect of business done
(v). or to be done
(vi). by the practitioner
(vii). either by gross sum
(viii). or otherwise howsoever

18. However, under section 77 (2), the client is given the liberty to apply to Court to review a Costs Agreement. And if the Court should think that the Agreement is unreasonable, the Court may then reduce the amount payable under a Costs Agreement, or cancel the Costs Agreement altogether.

19. If the Court decides to cancel the Costs Agreement because it is unreasonable, the Court may then determine costs payable and in what manner they are to be payable (section 77 (2)).

20. The factors which the Court must take into account when considering the reasonableness of a Costs Agreement are set out in section 77 (5).

21. Section 79 (1) provides that a practitioner is entitled to sue to recover his or her costs pursuant to any Costs Agreement. Section 79 (2) provides that it is not necessary for costs to have been taxed before the Practitioner institutes proceedings to recover costs.

22. Section 79 (2) then goes on to say:

> "In the absence of taxation no claim may be made by the practitioner for any costs which are, pursuant to such agreement or the appropriate schedule of fees, as the case may be, left to the discretion of the taxing officer"

CONCLUSION

23. I keep in mind that the overriding principle in all this is *"'what is the fair mode of trying that which is shown to be the substantial matter ... "*. The substantial matter – generally – is whether the costs which AK Lawyers are pursuing in this claim – whether based on the Bill of Costs – or the Costs Agreement – are reasonable.

24. As for the Bill of Costs – I am inclined towards the reasoning in **Bailey v IBC Vehicles Ltd** 1998 3 ALL ER 570. This case places the onus on the defendant to establish that the amount claimed is unreasonable.

25. As for the Costs Agreement, I am mindful that it is the Plaintiff firm of Solicitors which has instituted the claim and not the client. All that the plaintiff would have to establish are (i) the fact of the Agreement and (ii) that the defendant has some outstanding balance owing on the said Agreement. Once the plaintiff establishes that, the onus then shifts to the defendant to establish that the Agreement should be set aside either in part or in whole on whatever grounds she has deposed in her affidavit.

26. From the affidavits filed, the fact that the Agreement is not denied (albeit the defendant claims it was not properly explained to her) and the fact that the amount claimed is argued to be excessive beyond reasonableness – in my view, are enough to shift the onus to the defendant.

ORDERS

27. The trial will proceed with the defendant to begin its case first.

HIGH COURT OF FIJI
LAUTOKA

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Anare Tuilevuka
JUDGE
Lautoka
18 May 2023