

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

**Civil Action No. HBC 157 of 2013**

**BETWEEN:**           **SESEFO SIKURI INOKE and SARAH INOKE** both of  
Martintar, Nadi.

**PLAINTIFF**

**AND**           **:**       **WILLIAMS & GOSLING LIMITED** a limited liability  
company having its registered office at 80 – 82 Harris Road,  
Suva.

**DEFENDANT**

**Appearances:**       Mr Rupesh Singh for the Plaintiffs  
Mr Prasad N for the Defendant

**Date of Hearing:**    17<sup>th</sup> October, 2014

**Date of Judgment:** 25<sup>th</sup> November, 2014

**INTERLOCUTORY JUDGMENT**

**Introduction**

1. This is an application for Summary Judgment filed by the Plaintiff dated 5<sup>th</sup> of December, 2013 supported by an Affidavit sworn by the second-named Plaintiff on 6<sup>th</sup> November, 2013.
2. By the Summons filed, the Plaintiff is seeking the following orders:
  - (i) A sum of \$99,991.00.
  - (ii) Alternatively any other sum as maybe deemed just by the Court.
  - (iii) Interest.

- (iv) Costs of this application on Solicitor/Client indemnity basis.
  - (v) Any further Orders.
3. The Defendant has filed its Affidavit in Answer sworn by its employee Nanise Lesianawai on the 20<sup>th</sup> of March, 2014.
  4. At the hearing of the matter the learned Counsels for both parties made oral submissions and tendered written submissions with leave of the Court.

### Background

5. The claim by the Plaintiffs' application is based on an agreement entered between the parties on the 17<sup>th</sup> of August, 2012 to pack and store the Plaintiffs' personal effects for a shipment thereof overseas at a date to be advised.
6. It is admitted by both parties that the Plaintiff had hired the services of the Defendant to store their belongings with the Defendant in a 40 foot container and that the Plaintiff was charged and paid \$3,500.00 for the services.
7. It is also agreed that water had seeped into the storage container due to floods and that the second-named Plaintiff was informed about this by Ms Romana Andrews by an email on 4<sup>th</sup> October, 2012. Romana Andrews email is annexed marked as Exhibit F to the Affidavit of the Plaintiff.

### Summary Judgment

8. The application for Summary Judgment is filed pursuant to Order 14 Rule 1 of the High Court Rules which provides that the Plaintiff can make an application for Summary Judgment against a Defendant on the grounds that the Defendant does not have a defence to the claim or to a particular part of the claim. The filing of a Statement of Defence does not restrain an application for Summary Judgment to be made.
9. In the case of *Bank of New Zealand v Mavis Judith Baswaiya and 10 Others* [1992] HBC 27/89B it was stated as follows:

*".....the filing of a Statement of Defence before an application for Summary Judgment does not preclude an application being made, nor does it prevent Summary Judgment being granted if the Court is of the view that there is no defence to the claim."*

10. In this sort of application the onus of establishing that the claim is a good one and that there is no defence is on the Plaintiff. In the case of *Shantilal Brothers (Aust) Pty Limited v Dewan Chand* [2003] HBC 344/02 Pathik J said;

*"In this case the Defendant has already filed a Statement of Defence but that will not in a proper case, necessarily prevent the Plaintiff from making the requisite Affidavit swearing to the belief that there is no defence and proceeding under Order 14 (McLardy -v-Slateum) (1890) 24 QBD 504."*

He goes on to say that:

*"It is an important principle of the Summary Judgment procedure that the onus remains on the Plaintiff throughout to establish that the Defendant has no defence. ...."*

11. In *Habiscus Shopping Town Pty Ltd-v-Woolworths Ltd* (1993) 39 FLR 106 at 109 Thomas J stated:

*"The legal burden of proof is borne by the Plaintiff throughout the application, however when he had established a prima facie right to an order, a "persuasive" or a "evidential" burden shifts to the Defendant to satisfy the Court that Judgment should not be given against him."*

12. According to the guidelines set out by the above authorities the main issues to be considered by Court in this application are:

- (i) Whether the claim is a good one and that there is no defence or
- (ii) Whether the Defendant has satisfied Court that there are triable issues or dispute between the parties or that for some other reason there ought to be a trial.

13. In this matter it is agreed that written agreement was entered into by the parties and that the items belonging to the Plaintiffs' were stored by the Defendant pursuant to the said agreement in a container. It is also agreed that the said items were damaged due to water seeping into the container.
14. The Defendant contended that there was no duty owed to take care of the goods and there was no contractual obligation to take care of the goods. The Plaintiffs' allege that the Defendant is liable for the damage and that there is no limit of the liability raised in terms of the defence pleaded and that the contract document does not state anything about the limit of liability.
15. By way of defence, the Defendant plead that the no liability Email as being the agreement between the parties leading upto signing of the Pack and Store Contract.

16. The copies of the Emails exchanged between the parties prior to entering into the Pack and Store Agreement are annexed marked "B" to the Affidavit in Answer filed by the Defendant. In the Email dated 13<sup>th</sup> August, 2013 addressed to the Plaintiff by an employee of the Defendant it is stated as follows;
- "..... However, once goods have been packed we cannot be held liable then, I'd recommend you take an Insurance cover for goods whilst it's in storage. We can arrange this for you. Our charges are 4% + Vat of the total value declared to us."*
17. Though the Plaintiffs' argue that the said emails cannot be read as part of the contract I am of the view that they have acknowledged the exclusion by continuing with the transaction and entering into an agreement with the Defendant to pack and store their belongings. In the light of the no liability email I find that there is a clear issue to be tried in this matter; whether the said email forms part of the agreement or whether there could be implied conditions between the parties are important triable issues to be decided on evidence led at a Trial.
18. The Plaintiff also raised the question as to why the Defendant advised the Plaintiff to lodge a claim and provide the claim to its Insurer's for assessment if the limitation of liability was a condition to be relied upon by the parties. The Defendant in its Affidavit in Answer state that it did so on a without prejudice basis and the invitation to lodge the claim did not constitute any admission of liability by the Defendant. This again in my view is a valid defence and should be looked into at the trial of this matter.
19. The Plaintiffs' alleges in paragraph 6 of their Statement of Claim that the Defendant allowed or caused a forklift to puncture the side of the container which led to water seeping in. The Defendant in its Statement of Defence denies that it caused a forklift to puncture the side of the 40 feet container. There is no evidence of this before this court and therefore this allegation cannot be accepted without evidence being adduced.
20. Moreover, the claim in respect of damage to personal items amounting to \$99,991.00 is pleaded as special damages both for breach of contract and negligence. Special damages in a case of this nature are the precise loss suffered by a Plaintiff and should be demonstrated with specific reference to evidence. The Defendant should be made aware of the facts leading to the loss.
21. In this matter it is not disputed that flood water damaged the belongings of

the Plaintiffs'. In paragraph 16 of the claim Plaintiff refers to undamaged personal items and state that despite their repeated requests that Defendant is refusing to release those undamaged items. The allegation that the Defendant is refusing to release the undamaged belongings to the Plaintiff is denied by the Defendant in its Statement of Defence. Therefore I am of the view that the Plaintiffs' claim includes the value of the undamaged items as well. The Plaintiffs' Affidavit fails to account for this, as such I find that there is a uncertainty of the claim or the precise nature of the loss.

22. It was held in *Australim Can Co. Pty Ltd -v- Levin and Co. Pty Ltd [1947] VLR 332 at 335* if after argument there remains real uncertainty as to the Plaintiffs' right to judgment without further investigation of the facts, Summary Judgment must be refused.
23. In paragraph 22 of the Affidavit in support of this application it is stated that the amount the Plaintiffs' claim is based on the replacement cost of the damaged items shown in Exhibit H annexed to the Affidavit.
24. In perusing Exhibit H, I find that in addition to claiming for damaged items there are claims for the following:
  - (i) Cleaning of all items
  - (ii) Air Fares
  - (iii) Hotel Accommodation
  - (iv) Travel expenses to obtain pricing and to Lautoka Williams & Goslings yard
  - (v) Phone Calls
  - (vi) Pain and suffering/loss of personal documents.
25. Damages for pain and suffering /for loss of personal documents in my view is a claim for general damages which should be proved by adducing evidence.
26. Furthermore the Plaintiff's affidavit does not contain any evidence as to how the amounts for cleaning of all items, air fares, hotel accommodation, travel expenses and phone calls are made of. The onus is on the Plaintiff to prove that these expenses are related to this incident. Therefore the Plaintiff must prove these facts by adducing evidence at a trial not on a bare allegation.
27. It is evident from the Plaintiffs' letter dated 20<sup>th</sup> November, 2012 attached to Annexure 'H' that the amount claimed by the Plaintiff is the "replacement costs" for brand new items. It is contended by the Defendants' written submissions that the Plaintiff should be placed in the same situation with respect to damages and if the Court allow the Plaintiff's claim for brand new

items the Plaintiff will not be put in the same position before the alleged breach occurred but will go further to unjustly enrich them. Judgment of *Robinson -v- Harman (1848) 1 Ex 850* is cited in support of their contention.

28. Whether the Plaintiff is entitled to recover the value of brand new items instead of the value of used items which were damaged is another legal issue which should be decided after a trial.
29. In *Powszechny Bank Zwiazkowy W. Polsce -v- Paros (1932) 2KB 353 Greer L. J at p.359* said;

*".....It has long been the rule that in proceedings under Order XIV, what the Court, whether this court or the Kings' Bench division, has to ascertain is whether there is a triable issue. If there is, no matter how strongly the Court may anticipate that it will be decided in the Plaintiffs' favour, it must order a trial.*

30. *Prakash J in Sunila Devi Chandra -v- Fiji Care Insurance Ltd (2001) 1 FLR 73* stated as follows:

*"The procedure for Summary Judgment is well established by the authorities, and do not need exhaustive analysis here. The "White Book" Vol. 37 para 413 presents a succinct summary. An order for Summary Judgment may be granted if the Plaintiffs' claim is duly proved by affidavit evidence and "the Defendant is unable to set up a good defence or raise an issue which ought to be tried. Where no fairly arguable point is raised by way of defence it is the Court's duty to give Judgment for the Plaintiff, for the Defendant is bound to show some reasonable grounds of defence".*

*The Court also has to be mindful that genuine claims by either party is not frustrated by the Summary Judgment procedure. As Casey J stated in Douglas Trading Co. Ltd -v- Westend Services Ltd CA. 94/86. N.Z. Court of Appeal (12/12/86 unreported).*

31. In the light of all the above I am of the view that the Defendant has discharged the onus placed on him to show that there are triable issues in this matter and hence there ought to be a trial.

**Final Order**

32. In the outcome of the above reasons:

(a) I dismiss the Summons dated 5<sup>th</sup> December, 2013 for Summary Judgment.

(b) Costs in the cause.

(c) Matter to take its normal course.



A handwritten signature in black ink, appearing to read "Lal S. Abeygunaratne".

**Lal S. Abeygunaratne  
Judge**

At Lautoka  
25<sup>th</sup> November, 2014