

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

CIVIL ACTION NO. HBC 176 OF 2007

BETWEEN : **BARRY ARCH MOLLISON GARDNER** of
Vunaviavia Gounder Road, Nadi, Businessman.

Plaintiff

AND : **PRIME LAND DEVELOPMENT LIMITED** a
limited liability company having its registered
office at Suva.

Defendant

Before : Hon. Mr. Justice Sunil Sharma

Counsels : Ms. L. Tabuakuro for the Plaintiff
Mr. S. Krishna for the Defendant

Date of Hearing : 24 August, 2016

Date of Ruling : 26 August, 2016

RULING

[Summons to vacate Trial dates]

- [1] The Defendant by Summons filed on 15 July, 2016 seeks to vacate the trial dates of this action which is fixed for two days from 13 to 14 September, 2016. The Summons is supported by the affidavit of Kamini Kartika Singh sworn on 11 July, 2016.

- [2] The Plaintiff opposes the application to vacate trial dates and has filed his Affidavit in Opposition sworn on 12 August, 2016.
- [3] On 9 August, 2016 the application was assigned a hearing date for Monday 22 August, 2016. Unfortunately this date became unsuitable since a public holiday was declared. On 17 August, 2016 the matter was recalled and a new hearing date assigned for Tuesday 24 August, 2016.
- [4] Both Counsels made oral submissions, Mr. Krishna Counsel for the Defendant also filed helpful written submissions.
- [5] The Defendant makes this application pursuant to Orders 32 and 35 Rule 3 of the High Court Rules, 1988 and the Inherent Jurisdiction of the High Court. Order 35 Rule 3 of the High Court Rules gives a judge the discretion to adjourn a trial in the interest of justice as follows.

“The judge may, if he thinks it expedient in the interest of justice, adjourn a trial for such time, and to such place, and upon such terms, if any, as he thinks fit.”

- [6] The Defendant relying on the Affidavit of Kamini Kartika Singh states that the Director of the Defendant Company Vijay Kumar is currently in New Zealand recovering from a major operation for a life threatening condition. This major operation was carried out on 24 May, 2016.
- [7] Furthermore the Doctors treating Mr. Kumar have advised him that he needs to rest for one year to recover from this major operation and will require ongoing treatment. Mr. Kumar is unable to travel during this period. A letter from Auckland Colorectal Centre dated 7 June, 2016 is annexed to the affidavit.
- [8] Before going any further it is important to reproduce the contents of this letter:-

“7 June 2016

To Whom it May Concern

*Re: Vijay Kumar, 2/18 Omana Road, Papatoetoe, Auckland
2025 Tel: 021 1870667 DOB: 24/12/1935 NHI: UAR3817*

Mr. Kumar underwent a major operative procedure for a life-threatening condition on the 24.5.2016. He was able to be discharged on the 3.6.2016. He will take a long time to recover from this major operation and will require ongoing treatment. I do not believe he will be capable of undertaking major business nor travel for at least a year to recover.

Yours sincerely

Lincoln Israel"

- (9) The Defendant contends that the claim filed by the Plaintiff raises some serious issues and Mr. Kumar is the prime witness for the Defendant since he had negotiated with the Plaintiff. The Defendant will be greatly prejudiced should the hearing not be vacated because the Defendant will not be able to adduce his defence via oral evidence and what the truth is. The claim filed by the Plaintiff is over 2 million dollars.
- (10) When the trial date was assigned on 14 March, 2016 the Defendant was unaware that Mr. Kumar will undergo a major operation. The Defendant further states that this application is made about 2 months prior to the hearing date hence no prejudice will be caused to the Plaintiff and that the cost of this application be in the cause.
- (11) The Defendant also filed its Affidavit in Reply sworn on 24 August 2016 wherein the Defendant annexed a copy of Mr. Kumar's further medical report dated 10 August 2016 from Canopy Cancer Care, New Zealand which amongst other things mentioned that from 3 August 2016 Mr. Kumar commenced "*adjuvant weekly 5FU chemotherapy*" hence he requires regular monitoring and treatment by the doctors. Furthermore Mr. Kumar is continuously on heavy dosage of medication and at present he cannot give evidence by electronic means such as Skype. The Defendant reiterates that there is nobody else other than Mr. Kumar who could give evidence on behalf of the Defendant. Mr. Kumar's son who is currently assisting in the running of the business also cannot assist since he was not aware of the conversations that took place between the Plaintiff and his father. The Defendant is willing to compensate the Plaintiff if the matter is adjourned.
- (12) The Plaintiff in his Affidavit in Opposition sworn on 12 August, 2016 deposes that on 23 May, 2016 he was treated for Stage 4B Melanoma of

the left lung and had the lower lobe removed. In consultation with his Oncologist it was agreed that “chemo” will be deferred until his return from Fiji. His next appointment is on 26 October, 2016. In July when the Plaintiff visited the Moffitt Cancer Centre he was advised that he had a lesion in his right lung which was not there upon his discharge from the hospital on 26 May, 2016. The Plaintiff wishes to begin “chemo” as soon as he returns from Fiji.

- (13) The Plaintiff states that his airline tickets from Fiji Airways were originally purchased when he was informed that the trial would be heard in March, 2016. Furthermore the Plaintiff has also paid for his domestic tickets from Florida to California and any cancellation will incur financial losses.
- (14) Since the hearing of the matter was for 13 and 14 September the Plaintiff paid the surcharges for the changes made to his bookings and rescheduled his flight and the dates. The Plaintiff’s wife will also be giving evidence in this matter, she works in Baghdad, her travel and flights must be booked at least 3 months in advance and without financial penalties cannot be changed. His wife also requires a visa which is valid for a specific time.
- (15) According to the Plaintiff when his wife came to know that they will be travelling to Fiji in March his wife booked a portion of her travel using Frequent Flyer points and any change to this would incur great financial penalties and even if she was able to change the flights and make it to Fiji later the points may not be reissued since the majority of the travel is on a partner airline. Moreover his wife is only able to travel now and she has no other available dates this year. The Plaintiff’s wife is only permitted to be in the United States of America for 35 days when he became ill she came to USA on Emergency Family Leave and if the Court date is cancelled she will not be able to use her leave to return to the USA without suffering major tax penalties at the end of the year.
- (16) The Plaintiff has prepaid for Hotel and private accommodation as well as for a rental car in Fiji and in USA. The cancellation date for the Hotel in Los Angeles, California has passed and the Plaintiff will not be able to get a refund or credit.
- (17) The Plaintiff finally deposed that since 2007 the delay in the proceedings can be attributed to the Defendant or the Court due to staffing issues.

SUBMISSION BY COUNSELS DURING HEARING

- (18) Mr. Krishna, Counsel for the Defendant agreed that the matter was an old one dating back to 2007. However his firm only came on record in May 2015. He also submitted that it was very difficult to get a hearing date since the dates were mostly not suitable to the Plaintiff who was residing abroad. Mr. Krishna pointed out that in this matter the Defendant's witness Mr. Kumar and the Plaintiff were dealing with each other and the discussions were held between the two. He also accepted that the Plaintiff should be compensated for his loss but it should be a minimal amount. Mr. Krishna also noted that the Plaintiff in his Affidavit in Opposition has failed to attach any evidence of his travel arrangements and financial losses.
- (19) Ms. Tabuakuro, Counsel for the Plaintiff accepted the fact that Mr. Kumar was quite ill and not in a position to travel but her main concern was the delay caused in the proceeding. She agreed that there have been difficulties in getting hearing dates suitable to the Plaintiff.

DETERMINATION

- (20) The power to adjourn or refuse to adjourn a proceeding is within the discretion of the Court hearing the matter. This discretion is to be exercised judicially and in the interest of justice. The Defendant is seeking an adjournment since its Director Vijay Kumar is recovering from a major operation and therefore not in a position to travel and avail himself for the trial. Furthermore Mr. Kumar is the prime witness for the Defendant who negotiated with the Plaintiff and has knowledge of the issues in dispute.
- (21) The claim is a substantial one at the time the hearing date was assigned the Defendant did not know that Mr. Kumar will undergo a major operation. The letter from Auckland Colorectal Centre in New Zealand states that Mr. Kumar is not capable of undertaking major business or travel for at least a year. The latest annexure in the Affidavit in Reply sworn by Kamini Kartika Singh on 24 August 2016 also mentions that Mr. Kumar from 3 August 2016 has commenced weekly chemotherapy.
- (22) The Plaintiff on the other hand is ready for the hearing having filed his claim in 2007. He is also suffering from an illness and has deferred his

“chemo” treatment until after he returns from Fiji. He also deposed that there are financial repercussions in respect of changing his travel and accommodation bookings, his wife who is also a witness in the case works in Baghdad and that she must book her travel and flight at least 3 months in advance which also has financial repercussions as well. The Plaintiff attributed the delays in having his matter heard on the Defendant and the Court. I note that no evidence has been adduced in support of the financial losses the Plaintiff would incur.

- (23) This matter was assigned a hearing date in March this year for two days. The Defendant requires its prime witness to give evidence.
- (24) It is not in dispute that the Plaintiff is also suffering from an illness (although he has not annexed any letters from his doctors). Any adjournment will lead to financial losses to the Plaintiff and his wife needless to mention the inconvenience caused to them.

LAW

- (25) In coming to a decision I refer to the Court of Appeal decision in *Goldenwest Enterprises Ltd vs Timoci Pautogo*, Civil Appeal Number ABU 0038 of 2005 in particular paragraph 37:

“Generally, this is the principle covering courts’ discretion to adjourn or not to adjourn. If refusal to grant an adjournment amounts to a denial of a fair hearing and hence denial of natural justice or procedural fairness, or where a refusal to adjourn would cause definite and irreparable harm to the party seeking it, adjournment should be granted ...”

- (26) It is to be noted that in the appeal of *Goldenwest Enterprises Ltd* (supra) the Court of Appeal also took into account the case of *Dick vs Piller* [1943] All ER 627 at paragraph 41 the Court of Appeal made an important observation as follows:

“In Dick v. Piller in issue was whether the appeal was on point of law or fact. It was a question of law, said the Court, for by refusing the adjournment the judge ‘caused a serious miscarriage of justice, and ..., in doing so, rejected the first principle of law, for he

deprived the defendant of his very right to be heard before he was condemned': at 628"

(27) In view of the principles enunciated in *Goldenwest Enterprises Ltd* (supra) the test for adjournment of trial dates can be stated as follows:

- a) will refusal to grant an adjournment amount to a denial of a fair hearing and hence denial of natural justice or procedural fairness; or
- b) where a refusal to adjourn would cause definite and irreparable harm to the party seeking it; and
- c) is there any 'fault' on the part of the party seeking the adjournment.

WILL REFUSAL TO GRANT AN ADJOURNMENT AMOUNT TO A DENIAL OF A FAIR HEARING AND HENCE DENIAL OF NATURAL JUSTICE OR PROCEDURAL FAIRNESS

(28) It is the Defendant's argument that if the hearing date is not vacated it will cause a serious miscarriage of justice since the Defendant will be deprived of a fair hearing hence a denial of natural justice and procedural fairness because the Director of the Defendant Company who is the prime witness will not be able to give evidence as a result of his medical condition. I also note that the Plaintiff and Mr. Kumar had been playing a leading role in the dealings, meetings and conversations that took place between the two. Mr. Krishna finds support in the case of *Dick v Piller* (see paragraph 26 above).

WHERE A REFUSAL TO ADJOURN WOULD CAUSE DEFINITE AND IRREPARABLE HARM TO THE PARTY SEEKING IT

(29) Mr. Krishna argues that the Defendant had filed this application 2 months prior to the hearing date and that the application was not issued by the Court until 2 August, 2016. However the Defendant's Solicitors had put the Plaintiff's Solicitor's on notice about the impending Summons to vacate the trial dates and as such the Plaintiff had reasonable time to cancel the prior bookings. He further submits that if there is any

prejudice caused to the Plaintiff it will be minimal which can be compensated.

- (30) From the evidence placed before the Court there is no doubt that Mr. Kumar, the Defendant's witness plays a very crucial and important role for the Defendant in defending the claim filed by the Plaintiff. The claim is also a substantial one which requires evidence to be adduced so that a proper defence can be put before the Court for its determination.

IS THERE ANY 'FAULT' ON THE PART OF THE PARTY SEEKING THE ADJOURNMENT

- (31) In respect of this limb of the test the Court of Appeal in *Goldenwest Enterprises Limited* (supra) at paragraph 42 stated:

"There is, however, a requirement that there be no 'fault' on the part of the party seeking the adjournment: Piggott Construction v. United Brotherhood (1974) 39 DLR (3d) 311 (Sask. CA)..."

- (32) Mr. Krishna, Counsel for the Defendant submits that the hearing date assigned for the 13 and 14 September was fixed on 14 March 2016 with the consent of both the parties. He further states that Mr. Kumar was diagnosed of the serious life threatening condition in June 2016 and due to the seriousness of the illness Mr. Kumar had no option but to undergo a major operation. Mr. Krishna relied on the two (2) medical reports tendered as part of the Defendant's affidavits. He further adds that the Plaintiff compounded the difficulty since hearing dates were not suitable to him so that the matter could have been dealt with earlier.

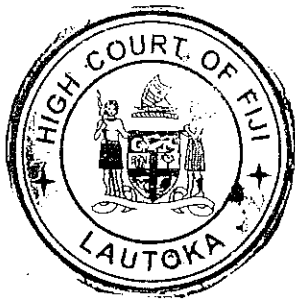
CONCLUSION

- (33) I have carefully considered the evidence put before the Court and the submissions made by both the Counsels I am satisfied that the Court should exercise its discretion in allowing the Defendant an adjournment. In the interest of justice I am also satisfied that the grant of an adjournment is warranted in the circumstances of this case. It is only fair that the Defendant be given the opportunity to put its defence properly before the Court through its witness and as a result be accorded natural justice and procedural fairness. On the same vein I am also of the


view that the Plaintiff ought to be compensated by the Defendant for the wasted hearing.

ORDERS

- (i) The application for adjournment filed by the Defendant is hereby granted;
 - (ii) The trial dates of 13 and 14 September, 2016 is hereby vacated.
 - (iii) The Defendant is to pay costs to the Plaintiff in the sum of \$1000.00 within 14 days.
 - (iv) The Defendant is to provide an affidavit attaching the November medical report of Vijay Kumar 7 days before the next mention date.
 - (v) The Defendant is also to provide via an affidavit the medical report of Vijay Kumar every 3 months after November, 2016.
- (34) Matter is adjourned to 30th November, 2016 for Mention.



At Lautoka
26 August, 2016



.....
Sunil Sharma
JUDGE

Solicitors

M/s. K. Law for the Plaintiff
M/s. Krishna & Co. for the Defendant