

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

**HBC NO. 248 OF 2014**

**BETWEEN** : **GENERAL MACHINERY HIRE LIMITED**  
**PLAINTIFF**

**AND** : **NEW INDIA ASSURANCE CO. LIMITED**  
**DEFENDANT**

**Counsel** : Ms. V. Lidise for the Plaintiff.  
: Mr. R. R. Gordon & Mr. W. Pillay for the Defendant.

**Date of Hearing & Ruling** : 17<sup>th</sup> November, 2017.

**Reasons for Ruling** : 7<sup>th</sup> December, 2017.

**Ruling by** : Justice Mr. Mohamed Mackie

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**REASONS FOR R U L I N G**

**(On Application for Adjournment of further Trial and Bench Warrant)**

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**INTRODUCTION:**

1. This is the written form of my extempore ruling, that I was called upon to make on 17<sup>th</sup> November 2017, when the learned Counsel for the plaintiff (plaintiff's Counsel), at the commencement of the 4<sup>th</sup> day of trial moved for an adjournment for further trial citing her predicament in calling two witnesses, who had failed to appear despite being subpoenaed.
2. This application being vehemently objected by the learned Counsel for the Defendant (Defence Counsel) this Court, after hearing the oral submissions of both the Counsel, made an extempore ruling disallowing the application for the adjournment, pending this written ruling with reasons thereto. This ruling also embodies reasons for the refusal of two other instant applications by the Plaintiff's Counsel, made subsequent to my refusal for the adjournment.

**BACKGROUND:**

3. The facts in this action are briefly as follows;
4. The Plaintiff, on 26<sup>th</sup> August 2014 filed Writ of Summons and Statement of Claim (S.C) against the Defendant, praying , *inter- alia*, for the following reliefs;
  - a. For declarations that the Defendant is liable to indemnify and insure the Plaintiff for all losses and damages suffered by virtue of the two insurance policies, namely, **Public and Product Liability Policy** and **Goods in Transit Insurance Policy**;
  - b. For damages in the sum of \$ 246,338.93 or for so much thereof as is found due from the Defendant together with the interest.
5. Pleadings reveal that during the time material the Plaintiff, with the knowledge of the Defendant, had entered in to a contract with MOBIL OIL AUSTRALIA PTY LIMITED, hereinafter referred to as “Mobil”, for the Plaintiff to provide transport services for the delivery of Mobil’s bulk and packaged Lubricant products from its Suva and Vuda terminals to Mobil’s joint ventures and customer service stations.
6. It is also in the pleadings that as the above contract required the Plaintiff to obtain comprehensive insurance covers, it had accordingly obtained from the Defendant the aforesaid two insurance policies, with additional premium being paid , to indemnify the Mobil , its joint ventures and Customers for losses , damages and consequential losses that may arise from the Plaintiff’s negligence in the performance of services, ( loading , transporting and unloading of the said products) under the contract between the Plaintiff and Mobil.
7. It is averred that on or about the 28<sup>th</sup> of April 2012 during the currency of the both insurance policies the Plaintiff’s employee Driver, namely, Abdul Ahad, was in the process of unloading approximately 26,300 litres of Bulk and packaged lubricants (Petrol & Diesel) from the Plaintiff’s fuel tanker bearing registration number EQ- 363 into the fuel storage tanks at the Carpenters Motors Service Station in Samabula, Suva, when a Crossover accident occurred resulting in the discharge of Auto Diesel Oil into the Service Station’s Unleaded Petrol storage tank and the discharge of unleaded Petrol into the Service Station’s Diesel storage tank as pleaded in paragraphs 11 and 23 of the statement of claim.
8. The Plaintiff claims that as a result of the said Crossover accident it had to pay unto the Mobil & others a total sum of \$ 246,338.93, being the loss and damages suffered by them and moves to recover the same from the Defendant on the aforesaid two insurance policies.

9. The Defendant in its Statement of Defence, while admitting its awareness about the general nature of the relationship that the Plaintiff maintained with the Mobil and the existence of two insurance policies as pleaded in the S.C, takes up the position that the limits of the indemnities are subject to exceptions, exclusions and limitations and thereby denies most of the averments in the Statement of claim, calling upon the Plaintiff for strict proof of same.
10. Originally, the trial in this action had been fixed before my brother judge Hon. S. Sharma, to be taken up from 3rd to 7th July 2017, and on an application made on behalf of the Plaintiff same stood vacated before him and the matter subsequently being transferred to my Court, same was re-fixed before me on 8th May 2017, for 5 days trial to be held from 13th to 17th November 2017.
11. However, when the trial was to commence before me on 13<sup>th</sup> November 2017, being the 1<sup>st</sup> date of trial, on a request made by the Plaintiff's Counsel, commencement of trial was postponed to the next day( 14<sup>th</sup> November 2017), thus pruning the total number of days for trial to four (4).
12. The Plaintiff had subpoenaed 3 witnesses, namely, (1) **Mr. Christopher Yee**, from the Insurance Broker "Marsh" (2) **Mr. Abdul Ahad**, Driver of the Plaintiff's tanker, and (3) **Ms. Karen Aisake**, fleet Manager, from Mobil Oil Fiji, Regional Head Office in Suva.
13. However, by the last date of the trial, i.e. on 17<sup>th</sup> November 2017 the Plaintiff's Counsel had only led the evidence of the said Driver **Abdul Ahad** and that of one of the Plaintiff's Directors, namely, **Mr. A. Singh**, wherein the 1<sup>st</sup> named witness driver gave evidence, particularly, on the alleged crossover accident as the person who was in charge of the entire process, while the later gave evidence touching, *inter alia*, the two current insurance policies issued by the Defendant and the Service Contract, admittedly, existed between the Plaintiff and the Mobil.

#### **THE LAW ON THE ADJOURNMENT:**

14. The Plaintiff's Counsel made this application pursuant to Order 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, which gives a judge the discretion to adjourn a trial in the interest of justice, reads 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."*
15. Counsel for the Plaintiff in her oral submissions referred to the Court of Appeal decision in ***Goldenwest Enterprises Ltd vs Timoci Pautogo, Civil Appeal Number ABU 0038 of 2005*** and drew the attention of the Court to paragraph 29 and other relevant parts of it, where the law on adjournment has been elaborately discussed.

16. Counsel for the Defendant too in his submissions highlighted several decisions on the subject decided within this jurisdiction, namely,
1. *Sharma V Akhil Holdings Ltd [2006] FJHC 82;HBC 155.2012 L (15<sup>th</sup> December 2006)*
  2. *Chandra V Chandra [2009]FJHC 54; HPP41119.2003(23 February 2003)*
  3. *Naidu V Medical Superintendent of Lautoka Hospital [2016] FJHC 10; HBC 358.2002 (19 January 2016)*
  4. *Ali V Rahman [2016] FJHC 368; Action 92.20013 (5 May 2016)*
17. In view of the principles enunciated in *Goldenwest Enterprises Ltd* (supra ) an application for adjournment of trial can be decided mainly on the following questions;
- A. *Will refusal to grant an adjournment amount to the 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?*
  - B. *Would it cause irreparable damage to the objecting party or could it be compensated by awarding cost?*
  - C. *Is there any 'fault' on the part of the party seeking the adjournment?*

#### **DISCUSSION:**

18. Plaintiff's Counsel's argument was that it would cause serious miscarriage of justice since the Plaintiff will be deprived of a fair hearing, hence a denial of natural justice and procedural fairness, because the fleet manager of the Mobil **Ms. Karen Aisake** and National claim Manager of the Insurance Broker "Marsh" **Mr. Christopher Yee**, who are the prime witnesses, will not be able to give evidence as a result, if the adjournment is not granted.
19. According to the Plaintiff's Counsel, Ms. Karen Aisake is awaiting a Medical clearances by her Doctor and thereafter another procedure by the in-house Doctor at Mobil, while Mr. Yee from Marsh is said to be uncooperative, in place of whom she says the plaintiff is now contemplating on calling another person from Suva, who is a former employee of Marsh. She further submits that if there is any prejudice caused to the Defendant, it will be minimal and can be compensated by awarding cost, for which the Plaintiff is said to be prepared to pay \$ 3000.00.
20. In reply, the Defence Counsel submitted that his client had a legitimate expectation that this trial will conclude in 5 days, as expected by the plaintiff's Counsel at the P.T.C and when fixing the hearing date and if it extends beyond 5 days, his client would be lumbered with additional cost at least for two further days of hearing plus today's cost

and the Air fare for him to make his appearance possible, in the event an adjournment is granted, in which case the total cost will be nothing less than \$ 15,000.00 according to him.

**Is there a Medical Certificate before the Court?**

21. In support of the application, what was submitted to Court by the Plaintiff's Counsel on 16th November 2017 from the Bar table is a copy of a letter dated 13th November, 2017, claimed to have been sent from Mobil's Lawyers Messrs MUNRO LEYS, to the Senior Court Officer of this Court with copy to Plaintiff's Solicitors. Same is appended to this ruling for easy perusal. My inquiry from the Registry of this Court revealed that such a letter has not been received 13rd November 2017 or thereafter.
22. It is not a Medical Certificate. The letter states that Ms. Aisake has not been cleared by her Doctors to attend to work or travel and she is scheduled for a review on 15<sup>th</sup> November 2017 at 2.30pm. It is to be observed that, had Ms. K. Aisake in fact undergone a review on 15<sup>th</sup> as stated in the above letter, Plaintiff's Counsel, when made the application for adjournment on 17<sup>th</sup> November 2017, should have been in a position to know about the clearance expected and her fitness to come to Court and could have advised the Court accordingly.
23. The Subpoena on her has been served on 27<sup>th</sup> October 2017 and she being a holder of a key position in such a large firm, with strict internal procedures in allowing her to work and travel, such as requiring her to undergo another test/procedure by her Company Doctor for the clearance, despite of being cleared by her own Doctor, has had enough time before the trial date to inform this Court or the Lawyers for the Plaintiff about her, purported, illness and her inability to come to Court.
24. Further, as per the impugned letter, what she was to undergo at 2.30 pm on 15<sup>th</sup> November 2017 was only a review. It means that by that time she should have had some previously obtained Medical Certificate/s, Prescriptions or Report of initial investigations of her "anonymous" illness, which should be serious enough for her to keep away from work and being present in Court to giving evidence.
25. There is no acceptable evidence before this Court to substantiate what her illness is? For how long is she suffering and stays away from work? Whether she is fit enough or not to be present in Court to give evidence?
26. Though, the purported claim that Ms. Karen has to undergo another procedure and test by the Mobil's Doctor, subsequent to the clearance by her own Doctor, can be accepted as an internal affair of the Mobil, generally followed with regard to its employees, it need not necessarily stop her from coming to Court soon after the clearance by her Doctor, if

she really wanted to come and give evidence in aid of the Plaintiff to recover the alleged damages.

27. The said letter does not even state that Ms. Karen is currently hospitalised, bedridden, under medication or strict medical advice restricting her movement and work.

28. Further, With regard to the writ of subpoena, the Order 38 Rule 14 (5) states;

*(5) "Unless a writ of subpoena is duly served on the person to whom it is directed not less than 7 clear days, or such other period as the Court may fix, before the date of hearing together with appropriate conduct money that person shall not be liable to any penalty or process for failing to obey the writ" (emphasize mine)*

29. The non-payment of the conduct money has been highlighted in the said letter by M/S MUNRO LEYS. When the business relationship the Plaintiff, admittedly, have had with the Mobil during the time material is considered, the non-payment of conduct money in advance need not be an issue at all, if the Mobil and/or Ms. Karen really wanted to assist the Plaintiff in its struggle to recover the alleged damages from the Defendant. However, it is observed that the non-payment of conduct money in advance, if needed, can be sued as a reason to keep away from Court.

30. All the above facts, when put together and carefully considered, makes one to entertain a reasonable doubt about the stance of the Mobil in assisting the Plaintiff by sending its employee Ms. Karen Aisake as a witness. It appears that the Mobil is implicitly indicating that it does not wish its fleet Manager Ms. Karen giving evidence in this case as a witness for the Plaintiff.

31. With regard to the next witness Mr. Christopher Yee, from the insurance broker, the Counsel for the Plaintiff from the inception of the trial has maintained the position that he is an uncooperative witness and if he is compelled by a Bench warrant he would turn hostile.

32. Following parts of her oral submission of the Plaintiff's Counsel with regard to the witness Mr. Christopher Lee is reproduced for clarity;

*".....In terms of the witness from Marsh, Christopher Yee; his evidence is also crucial my Lord but at this state; given his very clear indication to us both on the phone and writing to us my Lord; the concern that I have is; if compelled under subpoena, under bench warrant to come to Court and give evidence; he may become a hostile witness my Lord. Whatever his reasons are; which at this moment my Lord; to be perfectly honest; I believe it to be fear. I believe it to be fear".*

*".....In any event my Lord; that being the case; he is no longer the appropriate witness for the Plaintiff and that we'll have to look for an alternative witness; or do without any evidence from Marsh;"*

33. From the above, the conclusion that can be arrived at is that the insurance broker “Marsh” too has noticeably displayed that it does not wish to send its employees as witnesses in aid of the Plaintiff at its crucial moment for the reason best known to them.
34. Therefore, I am of the view that, under the above circumstances, this Court should not adjust its time table to suit the witnesses who are explicitly disregarding the Court and on account of a witness yet to be traced as a substitute for Christopher Yee. This would delay the trial further.
35. I am doubtful that Ms. Karen or anyone for that matter from Mobil would give evidence in the way Plaintiff expects and granting an adjournment expecting this witness to come at her convenience is not prudent.
36. The aforesaid letter sent on behalf of the Plaintiff’s witness Ms. Karen Aisake cannot be accepted and acted upon as a valid evidence for this Court to consider an adjournment in favour of the plaintiff.

**A. Will the refusal to grant an adjournment amounts to denial of fair hearing and hence deny the natural justice or procedural fairness;? Or whether the refusal to adjourn would cause definite and irreparable harm to the party seeking it?**

37. The crucial points that beg adjudication by this Court in the substantial final judgment would be on the alleged liability of the Defendant said to be arising out of the cross over accident occurred as a result of the admitted negligence of the Plaintiff’s Driver **Abdul Ahad** and if, the liability is decided in favour of the Plaintiff to what extent the Defendant is so liable on the insurance policies held by the Plaintiff.
38. In deciding the pivotal question of liability the evidence given by the Plaintiff’s Driver, in my view would be sufficient, if considered, together with the extensive evidence given by one of the Director of the Plaintiff Company Mr. Ajnil Singh.
39. The main document on which the witness from Mobil is to testify, according to the Counsel, is the contract that, admittedly, existed between the Plaintiff and Mobil during the time material to the incident. It is already a part of the agreed bundle of documents and has already been spoken about in detail by one of the Plaintiff’s Director Mr. Ajnil Singh. The Defence Counsel is not seriously disputing the existence and contents of this document. What he disputes is the overall alleged liability claimed by the plaintiff on the insurance policies.
40. It is my view that in the event, by the final judgment this Court finds that the Defendant is liable to pay the plaintiff’s claim on the policy/policies, it can, undoubtedly, have an opportunity to prove the extent / quantum of the damages at a subsequent hearing for the assessment of damages and if the Plaintiff is optimistic that it can prove the same by

calling these witnesses, it will be at liberty to do so and refusal of the adjournment or non-calling of the above witnesses now is not going to be detrimental or would cause any prejudice to the Plaintiff.

**B. Would it cause irreparable damage to the objecting party? If so could it be compensated by awarding cost?**

41. The claim of the Defence Counsel that the Defendant will have to incur a cost of around \$15,000.00, in the event of an adjournment, is not seriously refuted by the Plaintiff's Counsel. I am of the view that, if an adjournment is granted it will prejudice the Defendant and it will not be adequately compensated by payment of mere \$ 3000.00 offered by the Plaintiff.
42. There is an uncertainty as to, when the witness Ms. Karen Aisake is to be medically cleared by her own Doctor? Will she be allowed to come and give evidence by Mobil after the, purported, 2<sup>nd</sup> round of test and procedures by the in-house Doctor at Mobil? Will the witness Mr. Christopher Yee from Marsh turn amiable if brought under Bench warrant? who is the next witness yet to be named to substitute Christopher Yee? These are few questions for which this Court yet to be convinced with firm answers to warrant an adjournment. Otherwise further delay and cost will be inevitable.

**C. Is there any 'fault' on the part of the party seeking the adjournment?**

43. It was on 1st December, 2016, this action was fixed for trial to be held 3<sup>rd</sup> to 7th July 2017 and the Plaintiff had enough time to identify, get ready with the witnesses and to take appropriate steps to avoid a predicament of this nature at the last moment.
44. It is only on 27th October 2017, just one week prior to the 1<sup>st</sup> date of trial; the subpoenas on the so called prime witness Ms. Karen Aisake was served. This witness has had enough time to keep the Court or the Plaintiff's Solicitors informed about her, purported, illness and inability to come to Court.
45. It was only on 16<sup>th</sup> November, 2017, being the 4<sup>th</sup> day of trial, the Plaintiff's Solicitors brings a back dated letter to inform the Court that the witness Ms. Karen is ill and that she will have to face a screening. Her illness is yet to be diagnosed, and thereafter she has to pass another hurdle at the Mobil by the in-house Doctor in order to get green light to proceed to Court. Does this mean that the clearance by her own Doctor is insufficient for her to obey the subpoena and give evidence? She does not know the name of her Doctor even who is said to be attending on her.
46. It appears that there has been unpreparedness on the part of the Plaintiff/ Plaintiff's Solicitors in proceeding towards the trial in this case. They should have identified the correct witnesses and done diligent and timely home works for an expeditious trial.



47. If this was the predicament, the Plaintiff's Counsel and Solicitors were to face, they should have been aware of it in advance, and could have very well at the outset moved out the entire trial with no or minimal prejudice and inconvenience to the Defendant, its Solicitors and Counsel.
48. Therefore, it is my considered view that the adjournment sought for by the Plaintiff's Counsel on the last date of trial (17<sup>th</sup> November, 2017) is unwarranted and the Defendant should not have been allowed to suffer in this regard.

**SITE INSPECTION:**

49. It is pertinent to mention that on the request of the plaintiff's Counsel and with the consent of the Defendant's Counsel, a site inspection was carried out through which we were able see for our own Eyes the real loading process of the both type of Oil at the loading terminal of Mobil in Vuda and a typical unloading process at a Mobil Service station in Lautoka, respectively, which have given us a tremendous insight about the whole process involved.
50. I was in fact on the understanding that the both parties would cut down the number of witnesses and Counsel would also curtail the time taken on the witnesses who gave evidence, in the light of what we observed at the site inspection.
51. The reason being, that the important and final decision in this action largely depends on as to what happened and how it happened in the unloading process? Who was or were at fault? Or who is responsible for the alleged cross over accident in finally deciding the aspect of liability.
52. I am very much convinced that the evidence so far led by the prosecution and what we have witnessed at both the inspection sites would be sufficient and be of immense use in deciding the aforesaid questions without any further evidence being led by obtaining an adjournment.
53. In the event the question of liability is decided in favour of the plaintiff, it shall be at liberty to call necessary evidence, if needed, for the assessment of damages and to prove the payments the plaintiff is said to have made to the Mobile and others by way of loss and damages as pleaded in the statement of claim.
54. If, further trial in this matter is to be adjourned, probably, it cannot be accommodated for a date or dates in the near future. The first half of the next year's Court's Diary is already fully booked for various contested trials and hearings.
55. I am of the view that it is better, if all what we have gathered through our own Eyes at the site inspections should be made use before they fade away from our memories. I consider

it as the best evidence, coupled with the evidence already led, that would richly assist this Court in the adjudication of this matter. Thus I consider, any adjournment for further trial is uncalled and unwarranted.

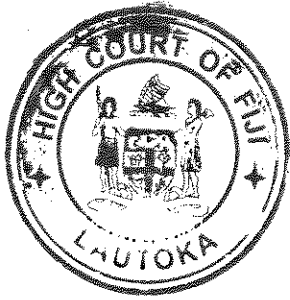
**APPLICATION FOR BENCH WARRANT:**

56. With the pronouncement of the above ruling disallowing the application for an adjournment, surprisingly, Counsel for the Plaintiff moved for a Bench warrant on Mr. Christopher Yee, the witness from Marsh, about whom Counsel had totally lost confidence and was very pessimistic.
57. Counsel could very well have moved for such a warrant at the commencement of the trial or at least prior to or at the time of making her application for the adjournment, which would have prompted this Court to some extent to consider the application for the adjournment favourably.
58. Counsel was very well aware that this witness was not cooperative at all and would be inimical to the Plaintiff's case if a Bench warrant is issued according to her own submissions made prior to the application for adjournment was made. (Vide paragraph 32 above) However, before making a Bench warrant order Court should be satisfied that the conduct money for the witness had been duly paid. Admittedly, no conduct money was paid. Thus the Court should not be inclined to issue a Bench warrant.
59. With all due respect, I must say that the application by the Counsel for a Bench warrant, after the refusal of an adjournment, was really confounding and a move the Court never expected from a senior Counsel. A Bench warrant at this stage would not have assisted the Counsel or this Court during the rest of the proceedings as the application for adjournment already stood ruled out. Hence, I have refused the application for Bench warrant.

**APPLICATION FOR A SHORT ADJOURNMENT:**

60. Subsequent to both the above rulings against the Plaintiff, the Counsel for the Plaintiff made another instant application for a short adjournment, stating that she wanted to speak to her client, who was said to be in Suva at that time.
61. The time was almost 3.30 Pm and the witnesses from the Defence were ready to be called, being the last date of the trial. The only sensible option available to the Plaintiff's Counsel at that moment was to close the Plaintiff's case allowing the Court to proceed with the Defence's case with no further delay.
62. The Counsel should have known and been prepared to do what the moment demanded in the best interest of the case and taking instruction from the client at that last moment by moving for an adjournment of this nature would not have taken the Plaintiff's case anywhere.

63. This move by the Counsel would, probably, have delayed the proceedings leaving no room for the Court to conclude the matter as per the schedule, compelling an adjournment for another day, which was already refused by the Court. Thus, with all due respect to the learned Counsel for the Plaintiff this Court, reluctantly, disallowed the application for a short adjournment too.
64. In my view, the foregoing reasons justify my decision made on 17<sup>th</sup> November 2017, to disallow the applications for the Adjournment of trial, Bench warrant and a short adjournment.



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A.M.Mohammed Mackie

**Judge**

At Lautoka  
7<sup>th</sup> December, 2017