IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 131 of 2017

BETWEEN : **MOHAMMED ISRAIEL** of Karavi, Ba, Mechanic.

PLAINTIFF

A N D : **SUNBEAM TRANSPORT LIMITED** a duly incorporated limited liability company having its registered office at 7 Yasawa Street, Lautoka, Fiji.

DEFENDANT

Counsel : **(Ms) Mere Vasiti for the plaintiff**
Mr.Vinisoni Filipe for the defendant

Date of hearing : **Thursday, 07th March, 2019**
Date of ruling : **Friday, 17th May, 2019**

RULING

[A] INTRODUCTION

(1) The matter before me stems from an application filed by the defendant seeking the following orders;

1. *The plaintiff avail himself for a medical examination in Suva and be examined by a doctor(s) of the defendant's choice.*

2. *The trial of this action fixed for 25th, 26th and 27th March, 2019 be vacated.*

3. *New Trial date(s) be fixed by the court.*

4. *The time for the service of this summons be abridged to one day.*

5. *Costs of this application be in the cause.*

6. *Such other order and directions the honourable Court deems just.*

(2) The application was made by summons dated 19th March, 2019 and supported by an affidavit sworn on 13th March, 2019 made by Mr Christopher Yee, the Solicitor in the employ of 'Haniff Tuitoga', Solicitors for the defendant.

(3) The application was opposed. An affidavit in opposition sworn on 20th March, 2019 by 'Liliwaimanu Vuiyasawa' the Solicitor in the employ of Munro Leys, Solicitors for the plaintiff was filed. The defendant filed an affidavit in reply sworn on 25th March, 2019 made by Mr Christopher Yee, the Solicitor in the employ of 'Haniff Tuitoga', the Solicitors for the defendant.

[B] BACKGROUND

(1) By writ issued on 06th July, 2019 the plaintiff claimed damages from the defendant for personal injury sustained by him in the course of his employment with the defendant.

(2) The chronology of events;

(a) Writ of Summons with Statement of Claim was filed on 6th July, 2017;

(b) The Statement of Defence was filed on 13th November, 2017;

(c) Reply to Defence was filed on 13th December, 2017;

(d) Affidavit Verifying Plaintiff's List of Documents (AVLD) was filed on 5th March, 2018.

(e) Affidavit Verifying Defendant's List of Documents was filed on 5th April, 2018;

(f) Pre-Trial Conference Minutes was filed on 22nd June, 2018;

(g) Summons to Enter Action for Trial and Copy Pleadings were filed on 11th July, 2018; and

(h) The Summons to Enter Action for Trial was listed for first call on 12th July, 2018. On this date the matter was adjourned for the file to be allocated to a Judge.

(i) On 10th August, 2018 the matter was fixed to 25th, 26th and 27th March, 2019 for trial.

[C] AFFIDAVITS FILED

There are three (03) affidavits filed in relation to the application;

(a) The affidavit of Christopher Yee (in support) sworn and filed on 19th March, 2019.

(b) The affidavit of Liliwaimanu Vuiyasawa (in answer) sworn on 20th March,

2019 and filed on 21st March, 2019.

(c) The affidavit of Christopher Yee (in reply) sworn on 25th March, 2019 and filed on 26th March, 2019.

[D] THE CONSIDERATION AND THE DETERMINATION

(1) On 19th March, 2019 the defendant filed an application seeking (amongst other orders);

- The plaintiff avail himself for a medical examination in Suva and be examined by a doctor of the defendant's choice.
- The trial of the action fixed for 25th, 26th and 27th March, 2019 be vacated.

(2) The application in relation to the adjournment of the trial was dealt with by the Court on 21st March, 2019.

(3) The plaintiff submits that he is entitled to wasted costs and costs on an indemnity basis due to;

(a) the substantial delay by the defendant in requesting the plaintiff be medically examined.

(b) the defendant is responsible for the delay in obtaining the medical report resulting in this application for adjournment.

(c) wasted costs to the plaintiff for trial preparation.

(d) the adjournment is prejudicial to the plaintiff.

(4) In written submissions before this court the plaintiff submitted in paragraphs 41 to 47 and 49 to 62 that;

(41) Pursuant to section 15(1) of the Act (refer paragraph 12), the onus is on the defendant to, as soon as reasonably possible, after the date on which the workman has given notice of an accident, arrange to have him medically examined by the doctor of its choice.

(42) Notice of an accident must be given by the employer as soon as practicable but not later than 14 days (refer section 14). The incident causing the plaintiff's injury occurred on 2nd August, 2014. The accident ought to have been reported by 14th August, 2014 and the plaintiff must reasonably possible been examined by the employer's doctor thereafter. The defendant's lawyer did not make the request until July 2017. This is almost 3 years after the incident.

(43) From 28th August, 2017 the defendant made no further attempts to secure the plaintiff's medical examination until 15th March, 2019. Note this is:

(a) *1 year and 7 months later; and*

(b) *7 months after the defendant appeared in Court and consented to setting the trial dates.*

(44) *From the defendant's lawyer's initial request in July, 2017 no further steps were taken by the defendant from 28th August, 2017 until 15th March, 2019. This is a period of 1 year and 7 months. At paragraph 11 of the Yee affidavit Mr Yee states:*

> *"No response was received to Mr Haniff's email with regards to the appointment till to date."*

(45) *The plaintiff submits this is a wholly inadequate explanation for the delay of 1 year 7 months. This is considering that the defendant's lawyers had been advised on 2 occasions that the plaintiff suffered a lot of discomfort travelling long distances due to injury and could not travel to Suva. The plaintiff asked that arrangements be made with a specialist in Ba or alternatively in Lautoka.*

(46) *It is further pertinent to note that the Court matter progressed through this period. Regardless, the Defendant's lawyer failed to take any steps to arrange the medical examination.*

(47) *The defendant further assumed that the plaintiff pay for the expenses of his trip to the medical examination (refer paragraph 7 of Yee affidavit). Section 15(1) of the Act provides that the plaintiff is to be medically examined free of charge to him.*

(49) *The plaintiff submits the defendant has substantially delayed in making the application.*

Defendant Responsible for the Delay

(50) *The plaintiff submits the defendant is responsible for the delay for which no meritorious explanation has been provided in the Yee affidavit. All that Mr Yee says at paragraph 13 is that:*

> *"In these circumstances, it would be unfair on the defendant's for the trial to proceed without a medical report from the defendant's doctors and as such the defendant will suffer prejudice."*

(51) *The plaintiff had made arrangements to obtain an updated report to support his claim. It was not unfair that the plaintiff had travelled to Lautoka to obtain a report. This was his prerogative. The defendant on the other hand, in an outright denial of its own obligations to arrange for its own doctor to examine the plaintiff, realised after receiving the plaintiff's latest report that it had not arranged its own medical report. The plaintiff respectfully submits this is not unfairness caused by the plaintiff. This is careless disregard on the defendant's own part.*

(52) *The defendant's negligence is clear and rampant throughout the 1 year 7 months it did not arrange for the plaintiff's medical examination. It is pertinent that during this period the court matter was progressing. In fact, on 12th July 2018 parties appeared in Court and consented to the Summons to Enter the Act for trial.*

(53) *When parties enter an action for trial it is notice to the Court there are no outstanding issues and that parties will proceed at trial based on the documents at hand. Pursuant to Order 34 Rule 4(2) the party taking out the summons is required to file "copy pleadings" which is made up of:*

(a) the writ;

(b) the pleadings (including any affidavits offered to stand as pleadings), any request or order for particulars and the particulars given;

(c) the minutes of pre-trial conference; and

(d) all orders made on the summons for directions.

(54) *The defendant's inaction is also clear and that it is a result of its own negligent inaction that this application was filed resulting in the trial's adjournment. Accordingly, the plaintiff submits he should be compensated with costs.*

Wasted Costs to the Plaintiff

(55) *The plaintiff has been put to expense preparing for trial and was ready to proceed on 25th March, 2019.*

(56) *In the affidavit in opposition evidence of work done and expenses incurred has been annexed. Even then this is not a full reflection of all expenses incurred. The plaintiff could not insert all the expenses as it was mindful of filing an affidavit as soon as possible so as to have the matter determined before 25th March, 2019.*

(57) *On 21st March, 2019 one of the plaintiff's witnesses travelled from Canada to Fiji to give evidence on the plaintiff's behalf. This is his brother in law, Mr Rohit Prasad. Mr Prasad had assisted the plaintiff since the incident together with the plaintiff's sister including travelling with the plaintiff to India where the plaintiff had medical treatment. Mr Prasad has incurred costs of approximately $3,000 to be here in Fiji.*

Prejudice to the Plaintiff

(58) *As a result of the defendant's inaction over a course of 1 year 7 months, the trial dates have been vacated.*

(59) From the date the trial date was set, 10th August, 2018 the plaintiff has waited in anticipation for 7 months for the trial to be completed so his claim can be determined.

(60) Now the plaintiff has to wait longer and incur more expenses in the future when trial preparation is required again. There is the risk the witness may become unavailable to attend the next trial date.

(61) The plaintiff is also concerned that his trial may not be heard in 2019 even though it is only the month of March due to the Court's busy schedule.

(62) The plaintiff submits determination of his claim has been unjustifiably delayed.

(5) The defendant's counter submission is that;
(reference is made to paragraphs 04 to 09 and 11 to 21 of the defendant's written submissions filed on 27th March, 2019)

(4) On 13th March, 2019 the plaintiff's Solicitor filed an application to file a supplementary list of documents. In the proposed list, is a medical report of Dr Mark Rokobuli dated 1st March, 2019. The supplementary list has since been filed.

(5) We do not have an issue with Dr Rokobuli's medical report per se. However, the defendant needs the plaintiff to be examined by a doctor of its choice in Suva. Requests had been made to the plaintiff's lawyers in 2017. Nothing favourable eventuated. Please refer to annexures CY1 to CY6 of Yee's affidavit for copies of the correspondences.

(6) The last correspondence was on 28th August, 2017 from Mr Haniff of Haniff Tuitoga – defendant's lawyers – to the plaintiff's lawyers. There was no response to Mr Haniff's email. This is confirmed in paragraph 11 of Vuiyasawa's affidavit where she says; "I inadvertently did not reply to this email." Mr Haniff in his email asked why the plaintiff was not able to take sufficient breaks during his travel to Suva.

(7) It is apparent from Dr Rokobuli's medical report that the Plaintiff was able to travel from the interior of Ba to Lautoka Hospital to get an updated medical report. There is therefore no reason why the plaintiff cannot travel to Suva to be examined by Dr Taloga. If he is able to travel by car, why is he not able to travel to Suva for the purposes of a medical examination. This question has not been answered by the plaintiff and or its Solicitors at all.

(8) Further to that, it is unrealistic for a doctor to take a day out of his appointments and travel to Lautoka for an examination when the evidence is that the plaintiff is able to travel by car.

(9) In the Supreme Court of British Columbia, the Court was presented with the same issue as the one that is before this Court today – Parsons v Mears, 2011 BCSC 397 (CanLII): http://canlii.ca/t/fktlg.

(11) *My Lord, yes the convenience of the plaintiff is a factor but it is not the determining one. In this case the plaintiff has clearly demonstrated that he can travel by car. So why can't he travel all the way to Suva with sufficient breaks. There is no explanation given by the plaintiff.*

(12) *The above authority was approved and applied by Justice Willock in Brebin v Stantos – 2011 BCSC 961.*

(13) *For the reasons set out above, the defendant respectfully seek an order that the plaintiff avail himself to an examination in Suva.*

(14) *Clearly, it would be unfair on the defendant for the trial to proceed without a medical report from the defendant's doctors and as such the defendant will suffer prejudice.*

(15) *Furthermore, the defendant repeats the contents of its letter to Munroe Leys dated 2 5th March, 2019 to address the issue of the adjournment and costs that the plaintiff is so vehemently arguing.*

(16) *The plaintiff somewhat blames the defendant for the delay and or the post-poning of the trial. Didn't the plaintiff only file its application to discover fresh documents one and a half weeks before the trial was due to begin? The fresh documents ranged from receipts to a medical report dated 1st March, 2019.*

(17) *The plaintiff would appreciate that the defendant was and is entitled to adequately prepare its case. There is no reason why the defendant is not entitled to obtain a medical report in response. Was one week sufficient to organize a doctor to examine the plaintiff and to re-prepare for the hearing in terms of the fresh medical reports? Obviously no.*

(18) *Secondly, the affidavit that sought to disclose the receipts says that it was 'inadvertently not listed' in the list of documents. Again, we are talking about a week and a half before trial for receipts that should have been in the plaintiff's possession some time ago. Surely, the defendant's solicitors should be afforded the opportunity to get instructions on the receipts and prepare for trial.*

(19) *Lastly, the plaintiff seeks indemnity costs in its letter dated 22nd March, 2019. There is no basis whatsoever for such a claim. It is obvious that it was the plaintiff's application that has caused the abandonment of the trial. Our agent in Lautoka reports that the trial was adjourned by the Court out of fairness to the defendant – it is only right that it was.*

(20) *It is the defendant who should be entitled to costs against the plaintiff for its late application to include fresh documents. Some of the documents were 'inadvertently not listed'. The plaintiff's Solicitors had also inadvertently failed to respond to Mr Haniff's email in 2017 asking why the plaintiff was not able to take sufficient breaks during his travel to Suva. If anything, the Defendant is the one that has suffered due to the "inadvertent" practices of the plaintiff and or its Solicitors.*

(21) My Lord, the defendant is happy to contribute to the "reasonable" expenses of the plaintiff having to come down to Suva for the medical examination.

(6) Counsel for the plaintiff cited following cases in argument.

(A) Starr v National Coal Board (1977) 1 WLR 63

(B) Prasad v Divisional Engineer Northern (2008) FJHC 234

(C) Labour Officer v Fiji National University (2018) FJET 17

(7) Counsel for the defendant cited following cases in argument.

(A) Parsons v Mears
2011 BCSC 397.

(B) Brebin v Santos
2011 BCSC 961

THE PRELIMINARY OBJECTION

(8) At the commencement of the hearing before the Court, Counsel for the plaintiff raised two preliminary objections to the affidavit of Christopher Yee (affidavit in support) sworn and filed on 19th March, 2019.

(9) Counsel for the plaintiff submitted that the supporting affidavit of Christopher Yee sworn and filed on 19th March, 2019 was defective in two respects: first, that Mr Yee is not the Solicitor in carriage for the defendant and does not state how he qualifies to depose an affidavit in this matter; and secondly, Mr Yee does not say how he acquired or is able to verify the information or the e-mails that were exchanged (and annexed to his affidavit) between the lawyers. Counsel then went on to submit that in those circumstances the evidence he deposes in his affidavit is therefore hearsay and is inadmissible and should not be allowed.

(10) To put briefly, Counsel for the plaintiff submitted that;

(A) The supporting affidavit is in breach of Order 41, rule 5 of the High Court Rules

and

(B) Evidence deposed is hearsay evidence and therefore inadmissible.

(11) Counsel for the plaintiff submitted that the correct person to depose the supporting affidavit on behalf of the defendant were either;

(A) an authorised officer of the defendant.

(B) the Solicitor with the carriage of the matter as the issues relate to factual and

legal matters in dispute.

(12) Counsel for the plaintiff then went on to submit that the supporting affidavit of Mr Yee has no value and as a result there is no evidence to support the defendant's application.

(13) Counsel for the plaintiff cited the following cases in argument;

(A) Pacific Agencies (Fiji) Ltd v Spurling (2008) FJCA 49

(B) Prasad v State (2001) FJHC 329

(14) Counsel for the defendant made two submissions in regard to that. He said, first the plaintiff's affidavit in opposition filed on 21-03.2019 is also defective because it was also not sworn to by the Solicitor with the conduct of the matter and it also carried no weight with the court in deciding this matter; and secondly, that by paragraph two (02) the deponent Christopher Yee says; "*I am able to depose as follows from facts within my knowledge from information derived upon investigation of the books, documents and/or papers concerning the matters which are the subject of this case and also by Feizal Haniff who is Counsel in carriage of this matter.*"

To put briefly, Counsel submitted that since the deponent Mr Yee has no personal knowledge of the facts contained in the annexures CY1, CY2, CY3, CY4 and CY5 (the email correspondence between the Solicitor with the conduct of the matter for the plaintiff and the defendant) he has ascertained the contents of the annexures by reference to them and the contents are true to the best of his information and belief. Then, Counsel goes on step forward and he seeks leave of the Court to use Mr Yee's affidavit in evidence under Order 41, rule 4 of the High Court Rules notwithstanding any irregularity in the form thereof.

(15) I cannot accept that it would be proper to entertain the submissions of Counsel for the Plaintiff regarding the appropriateness of Mr Yee's supporting affidavit which sprung on the defendant and the Court at the last minute. The plaintiff took the preliminary point of law at the beginning of his submission at the hearing of the defendant's summons.

(16) I note that the plaintiff has failed to file any application to set aside the defendant's affidavit in support for **"irregularity"** under Order 2, rule (2) of the High Court Rules and has taken further steps in the proceedings without raising the issue of irregularity by filing an affidavit in opposition.

I am at a substantial loss to understand why the plaintiff chose to offer response to the defendant's affidavit in support if there is any **defect or irregularity** in the affidavit.

If the plaintiff has considered that the defendant's affidavit in support is **irregular and defective,** he could have moved under Order 02, rule (2) of the High Court Rules. The plaintiff did not do so. The plaintiff had the opportunity to object but never did so. This is the first time the Court heard of such an objection to the defendant's summons seeking an adjournment of trial.

For the sake of completeness, **Order 2, rule (2) of the High Court Rules,** is reproduced below in full.

> *Application to set aside for irregularity (O.2, r.2)*
>
> ***(2)(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any documents, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.***
>
> *(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.*
>
> [Emphasis added]

Reading those words in their natural and ordinary sense, it seems to me reasonably plain that, Order 2, rule (2) provides than an application to set aside any proceedings for irregularity shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. The requirements are cumulative. Since the application in the case before me is not made within a reasonable time, the application will not be allowed. **If the Plaintiff had considered that the affidavit in support of the Summons seeking an adjournment of trial was in an irregularity, he could have moved under Order 2, rule (2) before he took another step.** If any proceedings are to be set aside on the ground of an irregularity, Order 2, rule (2) is applicable. An application under this rule may be made by Summons or Motion and the grounds of objection must be stated in the Summons or Notice of Motion. **The Plaintiff on his own volition chose not to follow the High Court Rules.** I am curious to know as to why the plaintiff chose not to follow the High Court Rules. It seems to me perfectly plain that the Plaintiff slept on the matter and did not wake up at all from his slumber. It is now too late to raise such an argument even if it had any validity.

In **"Ashwin Prasad v Carpenters** (Fiji) Limited", **Fiji Court of Appeal decision** No. ABU 0004 of 2004S, **"Penlington, J A** said as follows;

> *"The affidavit was in substantial compliance with O.41 r.4 and 5. The appellant did not raise any objection to the affidavit in his affidavit of 24th December, 2003.* ***If he had considered that the affidavit was in an irregularity he could have moved under Order 2 r.2 before he took another step. Instead he did not do so.*** *On 31st December, 2003 he filed the statement of defence and the two affidavits referred to previously.* ***It is now too late to raise such an argument even if it had any validity which we think it did not have."***
>
> (Emphasis added)

On the strength of the authority in the above case, I hold that the plaintiff's preliminary point must fail because of the delay involved.

In these circumstances, it will be at best a matter of academic interest only or at worst an exercise in futility to discuss the merits of the plaintiff's argument relating to the admissibility of Mr Yee's affidavit in support.

Accordingly, I do not uphold the technical point and the Court will look at the matter on merits.

APPLICATION FOR ADJOURNMENT OF TRIAL

(17) The application in relation to the adjournment of the trial was dealt with by the Court on 21st March, 2019. The plaintiff is now seeking indemnity costs, alternatively a sum of $10,000.00 as costs. The plaintiff argues that the application for adjournment of the trial;

(a) is filed after a substantial delay;

(b) is a result of the defendant's own inaction;

(c) substantial costs have been incurred;

(d) is prejudicial to the plaintiff.

(18) In response, the defendant says; (reference is made to the contents of the defendant's Solicitors letter dated 25.03.2019 addressed to the plaintiff's Solicitors addressing the reasons for the adjournment and the costs).

25 March 2019 *Our ref: S002-46/FYH*
Your ref:

"WITHOUT PREJUDICE SAVE AS TO COSTS"

Munro Leys
Pacific House
Butt Street
SUVA.

Attention: Mr Ronal Singh

By email ronal.singh@munroleyslaw.com.fj

And also by hand delivery

Mohammed Israiel v Sunbeam Transport Limited
High Court Civil Action No. 131 of 2017 (Lautoka)

We refer to your letter of 22 March, 2019.

Our first reaction to your letter was that you must have been writing about another trial that you are involved in. But upon a closer read, it is this matter that you are writing about and our reaction changed to 'you cannot be serious'.

For the record, your firm filed an application in court precisely a week and a half before the trial was set to commence. In your application filed on 13 March 2019, you sought to discover a fresh medical report obtained on 1 March, 2019. You also sought leave to file a list of various receipts.

First re the Medical report sought to be disclose on 13 March, 2019 is there any reason why the defendant is not entitled to obtain a medical report in response. If you think the defendant is entitled to obtain a medical report in response, is one week sufficient to organize a doctor to examine the plaintiff and to re-prepare for the hearing in terms of the fresh medical reports?

Secondly re the receipts, the affidavit seeking to disclose the receipts says that it was 'inadvertently not listed" in the list of documents. Again we are talking about a week and a half before trial for receipts you should have had in your possession some time ago. So again we ask, are we not entitled to get instructions from our client on these late disclosed documents.

Thirdly, re the examination of the plaintiff in Suva, again the affidavit of 20 March, 2019, at paragraph 11, the deponent says, "I inadvertently did not reply to this email." This was in reply to our email asking legitimately why the plaintiff was not able to take sufficient breaks during his travel to Suva.

However, we later find that the plaintiff was able to travel from his home in Ba to Lautoka Hospital. If he is able to travel by car, why is he not able to travel to Suva for the purposes of a medical examination? This question has not been answered at all.

You say in your letter that your client cannot travel to Suva but you do not give any adequate reasons. Again we ask, if he is able to travel by car for an hour that we know of from Ba to Lautoka, why he cannot travel to Suva by taking breaks during his journey or even two days to get to Suva. It is unrealistic for a doctor to take a day out of his appointments and travel to Lautoka for an examination when the evidence is that the plaintiff is able to travel by car.

Lastly, you seek indemnity costs. On what basis? It is obvious that it is your application that has caused the abandonment of the trial. At least that is how Justice Nanayakkara saw it and adjourned the trial. Our agent in Lautoka reports that Justice Nanayakkara adjourned the trial out of fairness to the defendant. In fact, we should be entitled to costs. Again we repeat, that you just cannot be serious!

Yours faithfully
HANIFF TUITOGA

(signed)
Feizal Haniff

(19) On 10th August, 2018 the trial dates were fixed for 25th, 26th and 27th March, 2019. On 19th March, 2019 the defendant filed Summons seeking the following orders;

1. *The plaintiff avail himself for a medical examination in Suva and be examined by a doctor(s) of the defendant's choice.*

2. *The trial of this action fixed for 25th, 26th and 27th March, 2019 be vacated.*

3. *New Trial date(s) be fixed by the court.*

4. *The time for the service of this summons be abridged to one day.*

5. *Costs of this application be in the cause.*

6. *Such other order and directions the honourable Court deems just.*

(20) The orders of the Court were made on 21st March, 2019. The Court granted the application for adjournment upon consideration of the following matters;

(A) the medical examination of the plaintiff by a doctor of the defendant's choice was essential for the proper determination of the case however it was too late to attend. Any refusal of the application will result in an inequality of arms, which will gravely prejudice the defendant given the contentious issues put on trial.

(B) About 13 days before the trial, i.e., 13th of March, 2019 the plaintiff sought leave to file 19 documents and the Court granted leave on 18th March, 2019. The affidavit seeking to disclose the documents says that it was "inadvertently not listed" in the list of documents. There was fault on the part of the plaintiff. The Solicitor for the defendant is entitled to get instructions from his client on these late disclosed 19 documents. Therefore, in fairness of the proceedings and the observance of the rules of natural justice the Court granted an adjournment. The Court was under a duty to take all the circumstances of the case into consideration.

(21) Having considered the above factors, the Court finds that the defendant has satisfied that;

(A) Any refusal of the application would amount to denial of a fair hearing.

(B) Any refusal of the application would affect the effective observance of rules of natural justice.

(22) The exercise of discretion either to grant or to refuse an application for adjournment of trial is a judicial act and when the orders of the Court were made, the following matters were borne in mind;

(a) the context in which the application is made;

(b) the conduct of the defendant and the plaintiff;

(c) whether the refusal of the application would amount to denial of a fair hearing;

(d) whether such refusal would affect the effective observance of rules of natural

justice.

(e) whether the plaintiff would suffer an irremediable loss or damage by granting the application.

(23) The test which should be applied **is not**

- whether there is a substantial delay in requesting the plaintiff be medically examined.
- whether the defendant is responsible for the delay in obtaining the medical report.

BUT

- whether the refusal of the application would amount to a denial of a fair hearing.
- Whether the refusal would affect the effective observance of rules of natural justice.
- Whether any "irreparable prejudice" would be caused to the plaintiff.

See;

(1) Goldenwest Enterprises Ltd v Pautogo (2008) FJCA 3

(2) Davies v Pagett (1986) 10 FCR 221

When the plaintiff's affidavit in opposition filed on 21.03.2019 is looked at more closely, it appears that the plaintiff has not pointed to any 'irreparable loss or damage' they suffered by granting the application for adjournment of the trial. Thus, it is manifest that the order would not cause any "irreparable prejudice" to the plaintiff. Thus, there is no reason to deny the application for adjournment.

(24) The adjournment of trial was granted (1) in the interest of justice (2) in accordance with the principles of fairness and (3) in observance of rules of natural justice and to ensure equality of arms.

The Court has every sympathy with the wish to maintain a tight rein on proceedings and to ensure expeditious hearings. Expedition is not the sole measure. Justice and fairness are essential features of the consideration for an application for an adjournment. Expeditious hearing is good. Justice is better!

(25) The plaintiff seeks costs of $10,000.00 for adjournment of the trial. I have concluded in paragraph 23 that there was no reason to refuse the application for adjournment of trial.

As I said earlier in paragraph 20(B), about 13 days before the trial, i.e., 13th of March, 2019 the plaintiff sought leave to file 19 documents and the Court granted leave on 18th March, 2019. The affidavit seeking to disclose the documents says that it was "inadvertently not listed" in the list of documents. Therefore, there was fault on the part of the plaintiff.

This is the conduct of the plaintiff seeking compensation by way of costs. Isn't the Solicitor of the defendant entitled to get instructions from their client on these late disclosed documents? Is one week sufficient to get instructions and re-prepare for the trial for the late disclosed 19 documents?

Besides, when the application for adjournment was granted on 21st March, 2019 Counsel for the plaintiff did not ask for costs for the adjournment of the trial. The conduct of the plaintiff asking for costs is an important element for consideration.

Due to the reasons which I have endeavoured to explain, I decline to make an order to compensate the plaintiff by way of costs for the adjournment of the trial.

Medical examination

(26) On 19th March, 2019 the defendant filed an application seeking (amongst other orders) that the plaintiff avail himself for a medical examination in Suva and be examined by a doctor of the defendant's choice.

(27) In the written submissions before this Court the defendant submitted in paragraph (5), (6), (7), (8), (9) and (14) that;

> *(5) We do not have an issue with Dr Rokobuli's medical report per se. However, the defendant needs the plaintiff to be examined by a doctor of its choice in Suva. Requests had been made to the plaintiff's lawyers in 2017. Nothing favourable eventuated. Please refer to annexures CY1 to CY6 of Yee's affidavit for copies of the correspondences.*
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> *(6) The last correspondence was on 28th August, 2017 from Mr Haniff of Haniff Tuitoga – defendant's lawyers – to the plaintiff's lawyers. There was no response to Mr Haniff's email. This is confirmed in paragraph 11 of Vuiyasawa's affidavit where she says; "I inadvertently did not reply to this email." Mr Haniff in his email asked why the plaintiff was not able to take sufficient breaks during his travel to Suva.*
>
> *(7) It is apparent from Dr Rokobuli's medical report that the Plaintiff was able to travel from the interior of Ba to Lautoka Hospital to get an updated medical report. There is therefore no reason why the plaintiff cannot travel to Suva to be examined by Dr Taloga. If he is able to travel by car, why is he not able to travel to Suva for the purposes of a medical examination? This question has not been answered by the plaintiff and or its Solicitors at all.*

(8) *Further to that, it is unrealistic for a doctor to take a day out of his appointments and travel to Lautoka for an examination when the evidence is that the plaintiff is able to travel by car.*

(9) *In the Supreme Court of British Columbia, the Court was presented with the same issue as the one that is before this Court today – Parsons v Mears, 2011 BCSC 397 (CanLII): http://canlii.ca/t/fktlg* ***(Tab 1).***

(14) *Clearly, it would be unfair on the defendant for the trial to proceed without a medical report from the defendant's doctors and as such the defendant will suffer prejudice.*

(28) Counsel for the defendant cited the following cases in argument;

(A) Parsons v Mears
2011, BCSC 397

(B) Brebin v Santos
2011 BCSC 961

(29) On the other hand, for the plaintiff it is said that the proposed place and time of the examination is unreasonable. In the written submissions before the Court, the plaintiff submitted in paragraph 32 that;

> *32. The plaintiff submits that the Defendant's demands relating to the time and place for the medical examination were unreasonable. The defendant had been advised on 2 separate occasions that the plaintiff suffered a lot of discomfort travelling long distances due to injury. In addition, the defendant has been provided with the plaintiff's medical reports:*
>
> *(a) dated 24th October, 2016 showing an impairment assessment of 24%; and*
>
> *(b) 1st March, 2019 showing an impairment assessment of 27%.*
>
> *At paragraph 4 of the Yee affidavit, Mr Yee states that the defendant has no issue with Dr Rokobuli's medical report per se. In that case, the plaintiff fails to understand why the defendant continues to insist that the plaintiff be medically examined in Suva.*

(30) Furthermore, the plaintiff submitted that pursuant to Section 15(2) of the Workmen's Compensation Act 1964, the medical examination is required to be at a time and place reasonable for the workman, the plaintiff.

(31) Finally, Counsel for the plaintiff drew the attention of the Court to '**White Book** (25/6/4) and the decision "***Starr v National Coal Board" (1977) 1 W.L.R. 63.***

(32) This is an application by the defendant for an Order requiring the plaintiff to attend a medical examination in Suva by a doctor of the defendant's choice. The purpose of that attendance is to examine the plaintiff and prepare a medical report for the assistance of the defendant in addressing the plaintiff's claim at the trial. There is agreement between the parties that the defendant is entitled to have the plaintiff attend at a medical examination of the defendant's choice.

The issue before me is whether the examination of the plaintiff should take place where the plaintiff resides or whether the defendant is entitled to choose the time and place of the examination.

The Solicitors for the plaintiff have described the nature of the medical problem that prevents the plaintiff from travelling from Ba to Suva. By email on 28th August, 2017 the plaintiff's Solicitors have informed the defendant's Solicitors based on the plaintiff's medical report dated 24th October, 2016 the plaintiff could not travel long distance due to the injury and have asked for an appointment with a doctor in Ba or Lautoka.(see annexure LMV-7). The defendant's Solicitors then enquired if the plaintiff could get in a car with stops on the way to arrive at Suva for a medical examination at Suva by Dr. Taloga. (See annexure – LMV- 8). The plaintiff's Solicitors did not respond to this.

(33) The plaintiff was a mechanic employed by the defendant for 14 years. The action arises out of injuries he sustained as a result of an accident in the course of his employment with the defendant. The law I understand is this,

In the **White book** (25/6/4) it states at page 496;

> *If the defendant asks for the plaintiff to be examined by a particular consultant doctor the court has jurisdiction to stay the action if the plaintiff refuses unreasonably to submit to such examination,* ***unless he can show some substantial ground for refusal, such as the particular doctor is likely to conduct his examination or make his report unkindly or unfavourably*** *(Starr v National Coal Board [1977] 1 W.L.R. 63; [1977] 1 All E.R. 243, CA).* ***It is safer to offer the plaintiff a choice of doctors.***
>
> (Emphasis added)

Further, section 15 of the **Workmen's Compensation Act 1964 states;**

> ***15.-*** *1 Where a workman has given notice of an accident,* ***the employer shall, as soon as reasonably possible after the date on which notice has been given, arrange to have him medically examined free of charge*** *to the workman, by a medical practitioner named by the employer and any workman who is in receipt periodical payments under section 9, shall submit himself for such medical examination from time to time, as may be required by the employer.*
>
> *(2) The workman shall, when required, attend upon such medical practitioner at the time and place notified to the workman by the employer*

or such medical practitioner, ***provided such time and place are reasonable.***

(3) In the event of the workman being, in the opinion of any medical practitioner, unable or not in a fit state to attend on the medical practitioner named by the employer, that fact shall be notified to the employer, and the medical practitioner so named shall fix a reasonable time and place for a person examination of the workman and shall send him notice accordingly.

(4) If the workman fails to submit himself for such examination, his right to compensation shall be suspended until such examination has taken place; and if such failure extends for a period of fifteen days from the date when the workman was required to submit himself for examination under the provisions of subsections (2) or (3), as the case may be, no compensation shall be payable, unless the court is satisfied that there was reasonable cause for such failure.

(5) A workman shall be entitled to have his own medical practitioner present at such examination at his own expense.

(6) During the period of temporary incapacity, the employer shall arrange to submit the workman for normal medical treatment by a medical practitioner approved by the employer at the expense of the employer. Such normal medical treatment shall include any specialist treatment which the medical practitioner may advise the workman to undergo.

(7) If the workman has failed to submit himself for treatment by a medical practitioner when so required the provisions of this section, or having submitted himself for such treatment has disregarded the instructions of such medical practitioner then, if it is proved that such failure or disregard was unreasonable in the circumstances of the case and that the injury has been aggravated thereby, the injury and resulting incapacity shall be deemed to be of the same nature and duration as they might reasonably have been expected to be if the workman had submitted himself for treatment by, and duly carried out the instructions of, such medical practitioner, and compensation, if any, shall be payable accordingly.

(8) Where under the provisions of subsection (4) a right of compensation is suspended, no compensation shall be payable in respect of the period of suspension.

(9) Notwithstanding the previous provisions of this section, where a claim for compensation is made in respect of the death of a workman, then if the workman failed to submit himself to examination by a medical practitioner when so required under the provisions of this section or failed to submit himself for treatment by a medical practitioner when so required under the provisions of this section or having submitted himself for such treatment disregarded the instructions of such medical practitioner, and if

it is proved that such failure or disregard was unreasonable in the circumstances of the case, and that the death of the workman was caused thereby, the death shall not be deemed to have resulted from the injury, and no compensation shall be payable in respect of the injury.

[Emphasis added]

(34) Here, the plaintiff has shown some justification (viz, the plaintiff could not travel long distance due to the injury he sustained as a result of the accident) for requiring that the medical examinations should take place in Ba or Lautoka. I am satisfied on the evidence that the plaintiff has established that there is any reason that justifies an order that he should be examined in Lautoka or Ba as opposed to Suva. In view of the plaintiff's medical condition, the convenience of the plaintiff is certainly a factor to be considered in determining the time and place of medical examination. There is no justification for requiring that the medical examination should take place in Suva. I am of the view that it is in the interest of justice in this case to order that the medical examination take place in Ba or Lautoka.

E. ORDERS

(i). The plaintiff's claim for compensation by way of costs is refused.

(ii). The application brought by the defendant to require the plaintiff to attend at the medical examination at Suva by Dr Taloga is refused.

(iii) I order that the plaintiff's medical examination by a doctor of the defendant's choice take place in Lautoka or Ba.

HIGH COURT OF FIJI
LAUTOKA

17/05/2019.

Jude Nanayakkara
Judge

At Lautoka,
Friday, 17th May, 2019