

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

CIVIL ACTION No. HBC 239/15

BETWEEN **RAVIN NARAYAN SHARMA** of Lautoka, unemployed
PLAINTIFF

AND **KAMAL PRASAD, ANISH PRASAD & URMILA PRASAD** all of
Lautoka, trading as VIJENDRA'S TAILORING CENTRE of 28
Yasawa Street, Lautoka
DEFENDANTS

APPEARANCES : Ms Nettles for the Plaintiff
Ms Lidise for the Defendant

DATE OF HEARING : 19 November 2020

DATE OF JUDGMENT : 26 March 2021

DECISION

1. These proceedings were commenced in 2015. By October 2018 they were said to be ready for trial; copy pleadings were filed, including the minutes of the pre-trial conference setting out issues to be determined. Since then, the proceedings appear to have gone astray, partly through delays caused by a change of solicitors by the defendants, but also – and more recently – because the plaintiff has sought to amend both the claims and the parties against whom he is claiming.
2. The proceedings arise from the death in October 2013 of the father of the first and second named defendants, and husband of the third named defendant. The claim alleges that prior to his death the plaintiff worked in businesses operated by the deceased. After the father's death, the plaintiff says:
 - i. his employment in the Vijendra's Tailoring businesses was unlawfully terminated by the defendants resulting in loss of wages/salary
 - ii. the defendants unlawfully converted/detained property that belonged to him [the plaintiff], including:
 - 3 sewing machines worth \$2100.00
 - 2 duplicating machines worth \$1800
 - blank DVD discs and cartons worth \$5000
 - 150,000 recorded movie DVDs worth \$450,000
 - 1500 original DVDs worth \$45,000and by doing so prevented him from carrying on a video rental business that he [the plaintiff] had been carrying on (with the knowledge and consent of the deceased) from the premises of the deceased's business since 2010, for

which he was paying rent to the deceased. The plaintiff says that the loss of this business has cost him \$300.00 per day since the items were seized/impounded by the defendants.

3. In a fairly uninformative statement of defence and counterclaim the defendants deny that they have ever employed the plaintiff, and that they have any responsibility for the business of Vijendra's Tailoring. They also deny conversion of the items owned by the plaintiff. Instead they say that the plaintiff, in December 2013 left these items at their premises without their consent, and refused to remove them. As a result they claim loss of rental income of \$3000 per month from December 2013.
4. In July 2018 the defendants filed and served a sworn list of documents, in which reference was made to the existence of a company, Nesh Investments Ltd. However, when the pre-trial conference was held and a list of issues was agreed, there was no reference to Nesh Investments Ltd, and the issues listed, in so far as they relate to whom the plaintiff was employed by, and the status of the defendants, was still somewhat obscure. It seems that the defendants have chosen to take advantage of, rather than clarify, the uncertainty that existed – and still exists – about exactly who the plaintiff was employed by, the capacity in which they inherited the property of their deceased father and husband, and who owned the premises that the plaintiff used for the operation of his business.
5. In late 2019, when the proceedings were supposedly ready for trial, the defendants changed their solicitors. This appears to have resulted in all parties focussing on what were the true issues raised by the plaintiff's claims and the defendants' counterclaim. There was discussion about an amended statement of defence and counterclaim, and then about an amended statement of claim. Neither of these was filed, but in July 2020 the defendants filed an application to strike out the statement of claim pursuant to Order 18, rule 18(1)(d) of the High Court Rules (abuse of the process of the court, vexatious and frivolous). In support of this application, in an affidavit by the first named defendant filed on 14 July 2020, the defendant's asserted that:
 - The late Vijendra Prasad (father and husband of the defendants) operated two businesses, first – from 1981 - Vijendra's Tailoring, from premises at 25 Yasawa Street, Lautoka, and second – from 1998- Nesh Investment Limited (NIL), from a property at 21 Drasa Avenue, Lautoka. Vijendra's Tailoring and NIL are two separate entities with different business registrations. Mr Prasad's affidavit does not disclose who is currently operating Vijendra's Tailoring, but it seems from his father's will that he and his mother have been appointed executors of the estate, and so are presumably operating the Vijendra's Tailoring business, and control the company.
 - The business operated by NIL included both a video rental business, and tailoring (i.e. the video rental business claimed by the plaintiff belonged to NIL, not to the plaintiff – this in spite of the assertion in the defendants'

counterclaim that the plaintiff had left the items claimed by him at the 'defendants' premises in December 2013 and had refused to remove them).

- The plaintiff was always employed by NIL (not by Vijendra's Tailoring) to work as a tailor at 21 Drasa Avenue.

The affidavit does not say who owns the properties at Yasawa Street, and Drasa Avenue, or on what basis they are occupied by the businesses, or whether the businesses are still operating.

6. This application appears to have prompted the plaintiff's solicitors to file, on 7 August 2020, the amended statement of claim that had previously been discussed, but not pursued. The amended writ of summons and statement of claim also referred to new or different parties from those who were named originally as defendants, said to be trading as Vijendra's Tailoring (as per the entitling above). In lieu of the original defendants, the amended writ of summons named:

- i. as first defendants, Urmila Wati and Ravinesh Kamal Prasad as the executors of the estate of Vijendra Prasad trading as Vijendra's Tailoring Centre.
- ii. as second defendant, Nesh Investments Pte Limited.

and has dropped the name of Anish Prasad altogether. Otherwise it has repleaded the claims so as to bring the same claims as before against the parties now said to be his employer. Unfortunately, the amended pleadings are still somewhat confusing as to who (and in what capacity they were said to be acting) is said to be responsible for first dismissing the plaintiff from his employment from NIL, and then seizing and not returning his video rental equipment and stock.

7. In a second application filed on 12 August 2020 the defendants applied to strike out this amended writ of summons and statement of claim, on the basis that it was filed without the plaintiff obtaining the prior leave of the Court.
8. Finally, on 14 September 2020, the plaintiff filed a rather confusingly worded application, which appears to seek leave to add the parties listed in the amended writ of summons, in reliance upon O.15, r.6 and O.28, r.3 and the 'inherent jurisdiction of the court' (always a reliable fallback it appears).
9. These three applications:
 - Application by the defendants dated 14 July 2020 to strike out the plaintiff's claims
 - Application by the defendants dated 12 August 2020 to strike out the plaintiff's amended writ of summons and statement of claim filed on 7 August 2020
 - Application by the plaintiff dated 14 September 2020 for leave to amend the proceedings by adding new defendants in lieu of the previous defendants, and adding a new defendant, Nesh Investments Ltd, and making consequent changes to the statement of claim.

came before me for hearing on 19 November 2020. I received written submissions from counsel for the defendants, and brief oral submissions on behalf of the plaintiff.

The law

10. Order 15, rule 6 High Court Rules provides:

Misjoinder and nonjoinder of parties (O.15, r.6)

- 6(1) *No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.*
- (2) *Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application—*
- (a) *order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;*
- (b) *order any of the following persons to be added as a party, namely—*
- (i) *any person who ought to have joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or*
- (ii) *any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy which in the opinion of the Court it would be just and convenient to determine as between him [or her] and that party as well as between the parties to the cause or matter.*
- (3) *An application by any person for an order under paragraph (2) adding him [or her] as a party must, except with the leave of the Court, be supported by an affidavit showing his [or her] interest in the matters in dispute or, as the case may be, the question or issue to be determined as between him [or her] and any party to the cause or matter.*
- (4) *No person shall be added as a plaintiff without his [or her] consent signified in writing or in such other manner as may be authorised.*
- (5) *No person shall be added or substituted as a party after the expiry of any relevant period of limitation unless either—*
- (a) *the relevant period was current at the date when proceedings were commenced and it is necessary for the determination of the action that the new party should be added, or substituted, or*
- (b) *the relevant period arises under the provisions of subparagraph (i) of the proviso to paragraph 4(1)(d) of the Limitation Act [1971] and the Court directs that those provisions should not apply to the action by or against the new party.*
- In this paragraph “any relevant period of limitation” means a time limit under the Limitation Act [1971]*
- (6) *The addition or substitution of a new party shall be treated as necessary for the purposes of paragraph (5)(a) if, and only if, the Court is satisfied that—*
- (a) *the new party is a necessary party to the action in that property is vested in him [or her] at law or in equity and the plaintiff’s claim in respect of an equitable interest in that property is liable to be defeated unless the new party is joined[;]*

- (b) *the relevant cause of action is vested in the new party and the plaintiff jointly but not severally[;]*
- (c) *the new party is the Attorney-General and the proceedings should have been brought by relator proceedings in his [or her]*
- (d) *the new party is a company in which the plaintiff is a shareholder and on whose behalf the plaintiff is suing to enforce a right vested in the company[;] or*
- (e) *the new party is sued jointly with the defendant and is not also liable severally with him [or her] and failure to join the new party might render the claim unenforceable.*

Order 18, rule 18 states:

Striking out pleadings and indorsements (O.18, r.18)

- 18(1) *The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—*
- (a) *it discloses no reasonable cause of action or defence, as the case may be;*
 - (b) *it is scandalous, frivolous or vexatious;*
 - (c) *it may prejudice, embarrass or delay the fair trial of the action; or*
 - (d) *it is otherwise an abuse of the process of the court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*
- (2) *No evidence shall be admissible on an application under paragraph (1)(a).*
- (3) *This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.*

11. As the commentary in the High Court Rules makes clear, as affirmed in numerous cases, the jurisdiction under O.18, r.18 is to be exercised to strike out proceedings only in those cases where it is clear that the plaintiff's claim cannot succeed. In **Lindon v Commonwealth of Australia** (1996) 136 ALR 251 (at p.256) Kirby J summarised the key points (in reference to the Australian equivalent of our O.18, r.18) as follows:

- 1. *It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the court, is rarely and sparingly provided.*
- 2. *To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action ... or is advancing a claim that is clearly frivolous or vexatious..*
- 3. *An opinion of the Court that a case appears weak and such that is unlikely to succeed is not, alone, sufficient to warrant summary termination... even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and arguments and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*
- 4. *Summary relief of the kind provided for by O.26 r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer.... If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.*

5. *If, notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a Court will ordinarily allow that party to reframe its pleading.*
6. *The guiding principle is, as stated in O 26 r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit.*

12. Section 4 of the Limitation Act 1971 (referred to in O.15, r.6 above) provides (I have omitted those parts of the section that clearly do not apply here):

Limitation of actions of contract and tort, and certain other actions

4(1) *The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-*

- (a) *actions founded on simple contract or on tort;*
- (b) *actions to enforce a recognizance;*
- (c) *actions to enforce an award, where the submission is not by an instrument under seal;*
- (d) *actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:*

Provided that-

- (i) *in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and*
 - (ii) *nothing in this subsection shall be taken to refer to any action to which section 6 applies.*
- (7)** *This section shall not apply to any claim for specific performance of a contract or for any injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as has, prior to the commencement of this Act, been applied.*

Also possibly relevant to the issues arising in this proceeding is section 15 of the Limitation Act 1971, which states:

FRAUD AND MISTAKE

Postponement of limitation period in cases of fraud and mistake

15. *Where, in the case of any action for which a period of limitation is prescribed by this Act, either-*

- (a) *the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or*
- (b) *the right of action is concealed by the fraud of any such person; or*
- (c) *the action is for relief from the consequences of a mistake,*

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against or set aside any transaction affecting, any property which-

- (i) *in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or*
- (ii) *in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.*

Analysis

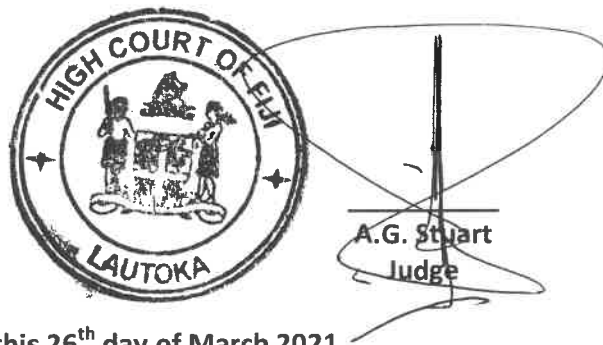
13. I am not satisfied that the plaintiff's claims for wrongful dismissal, and for conversion, are 'clearly frivolous or vexatious' so as to warrant striking out. In so far as the claim seeks compensation for wrongful dismissal, it now (since the disclosures made by the defendants in their affidavit in support of the striking out application) seems apparent that the plaintiff's employer was the company NIL, rather than the defendants' father personally, but given the fact that it seems that both the father and the company traded under the name Vijendra's Tailoring, the plaintiff can hardly be blamed for being unsure about this. If this confusion arose from a mistake on the part of the plaintiff, or through fraud on the part of the defendants or their father, the effect of s.15 Limitation Act 1971 is that the six-year limitation period runs from when the plaintiff learned of the mistake or fraud, or could with reasonable diligence have done so. Here the statement of defence filed by the defendants does not - as it could and should have to fully and fairly disclose the nature of the defence - disclose the fact that the plaintiff was not employed by their father, but by the company. If the company, once joined, elects to file a limitation defence, the plaintiff may be able to answer that defence by relying on section 15 of the Act. If that answer is upheld, the addition of NIL as a defendant will not be in breach of O.15, r.6(6) of the High Court Rules.
14. However, the plaintiff needs to spell out in its statement of claim what losses it claims for the alleged wrongful dismissal. A claim for distress, embarrassment etc caused by unjustified dismissal may be a claim for general damages, but a claim for loss of wages is not. The plaintiff must be able to calculate and prove what he has lost as a result of losing his job (noting that he was employed as a tailor, and we do not know if the business of Vijendra's Tailoring is still carrying on). It may be that if the business was closed down following the death of the defendants' father, it was inevitable that the plaintiff would be made redundant, and in this scenario any claim for loss of wages will be modest. The plaintiff will need to decide whether the employment claim is worthwhile, taking into account the uncertainty about damages and arising from the limitation issue.
15. The conversion claim is different. Here the plaintiff originally sued the three children of the deceased in the mistaken belief that they all took over their father's business, and in doing so converted the plaintiff's belongings, i.e. the stock and equipment used in the video rental business. It seems that the defendants acknowledge that the equipment belonged to the plaintiff (they say they invited the plaintiff to remove it, and all the defendants have counterclaimed for loss of rental when he did not do

so). If the defendants' actions constitute conversion, the capacity in which they were acting when they detained the goods is irrelevant to the claim and any defence, as the defendants implicitly acknowledge by failing to clarify in what capacity they are counterclaiming for loss of rental. It seems that the only issues that arise in the conversion claim are whether the goods were detained, and if so, what were the goods worth, and what other losses did the plaintiff suffer. If not, is the plaintiff liable under the counterclaim, and what losses have the defendants incurred. Again, I would expect a much clearer pleading of both the claim and the counterclaim to particularise the amount of damage said to arise in each scenario.

16. In my view this claim falls into the category of claims referred to in paragraph 5 of the factors referred to by Kirby J in the **Lindon** case (above), i.e. that the plaintiff has a reasonable cause of action, that has been poorly pleaded. I give leave in terms of O.15, r.6 to the plaintiff to add Nish Investments Limited as a defendant, on the basis that NIL will be entitled (unless the plaintiff can establish that section 15 Limitation Act applies) to plead that it has been wrongly joined in breach of O.15, r.6(6).

Conclusion

17. The defendants' applications of 15 July and 12 August 2020 are dismissed. The plaintiff's application to add Nish Investments Ltd as a defendant is allowed, subject to the conditions referred to in paragraph 16 above. If required, and assuming it wishes to do so, the plaintiff is given leave to discontinue its claim against the second named defendant, although I note that he is included in the defendants' counterclaim, and so presumably also accepts the burden of the plaintiff's claim, if it is successful, for detention of the plaintiff's chattels.
18. The plaintiff is to file a further amended statement of claim within 28 days addressing the pleading points referred to above. The case is adjourned for mention to the 30th day of April 2021 at 10.30 to monitor compliance.
19. Costs are reserved.



At Lautoka this 26th day of March 2021

SOLICITORS:

Iqbal Khan & Associates, Barristers & Solicitors, Lautoka for the plaintiff
Young & Associates, Solicitors, Lautoka for the defendants