

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. **HBC 77 of 2017**

BETWEEN : **SATYA PRASAD**

1st PLAINTIFF

AND : **THE MEDICAL SUPRITENDENT OF THE CWM
HOSPITAL**

1ST DEFENDANT

AND : **ATTORNEY GENERAL OF THE REPUBLIC OF FIJI**

2ND DEFENDANT

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Mr A. Namua for the plaintiff**
: **Ms. M. Motofaga for the defendants**

Date of Hearing : **10 March 2022**

Date of Decision : **12 August 2022**

DECISION

PRACTICE & PROCEDURE
1988

Specific discovery – Order 24 Rule 7 of the High Court Rules

1. The plaintiff filed action in March 2017 to recover damages from the first defendant for negligence in performing coronary artery bypass graft surgery on 13 February 2015 at the Colonial War Memorial Hospital (CWM). The defendants denied liability, stating that the plaintiff was not referred to the CWM hospital, but to cardiac specialists from the Sahyadri Speciality Pacific Hospital Ltd (SSPHL), who were operating at the CWM hospital in February 2015.
2. Summons to enter action for trial was filed on 8 May 2019. However, on the day fixed for trial, on 5 August 2019, counsel for the plaintiff moved to add another defendant on the basis of a joint venture agreement between SSPHL and the government of Fiji. The parties, thereafter filed affidavits, and several dates were taken to serve summons on SSPHL as it could not be located at its given address in Fiji. Eventually the application was withdrawn. When the matter was mentioned on 6 August 2020, Mr. S. Sharma submitted that he would file an application to add the insurance company that issued the insurance policy to enable SSPHL to operate in Fiji in terms of the joint venture agreement with the government.
3. Thereafter, the plaintiff filed a summons for specific discovery on 1 September 2020 seeking in the main an order for the defendant to provide or disclose to the plaintiff “a copy of the insurance policy or cover between SSPHL and the Insurance Company as per the agreement executed between Sahyadri Speciality Pacific Hospital and the Government of Fiji on the 12 July 2012”. The plaintiff made reference to clause 3 paragraph (G) and clause 4 paragraph (C) of the joint venture agreement.
4. Mr. Satya Prasad, the plaintiff, stated in his affidavit in support that on 3 February 2015, upon payment being made, he underwent surgery carried out by the first defendant through its agent, SSPHL; that no disclosure was made to him by the defendants that there was an agreement between the government and SSPHL at the time the surgery was carried out; that after these proceedings were filed,

solicitors for the defendants had given the plaintiff's solicitors a copy of the agreement; and that in terms of the agreement the defendants were to provide him with insurance cover for the surgery performed on 3 February 2015.

5. Mr. Prasad averred that his solicitors wrote to the second defendant requesting for the name of the insurance company so that an application could be made to join the insurance company as a party to these proceedings, but the second defendant had failed to provide such information.
6. The plaintiff submitted that when he took steps to join SSPHL as a party he found that they did not have a registered office in Fiji, and, therefore, the summons for joinder was withdrawn and an application was filed for specific discovery of documents. He submitted that the plaintiff proposed to join the insurance company that had issued the policy once it is able to identify the insurance company, and that the insurance documents would disclose the necessary information for the purpose. Mr Namua submitted that the document sought to be discovered would throw light on the present dispute between the parties. He submitted that the defendant has the knowledge of the existence of this document as the CWM Hospital could not have operated the hospital with doctors from SSPHL without an insurance cover.
7. The defendants opposed the application. Manjula Lal, acting manager with the Ministry of Health and Medical Services gave an affidavit opposing the plaintiff's application. It was averred *inter alia* that the government of Fiji through the Ministry of Health and Medical Services entered into a joint venture agreement with SSPHL; that in terms of this agreement, SSPHL agreed to provide specialised services in cardiology, neurology, and joint replacement in Fiji; and that SSPHL provided medical personnel to undertake specialised services and had agreed to indemnify the government of Fiji. The health ministry official averred that the details of the insurance company engaged by SSPHL are not with the Ministry of Health, and that the information could be provided by SSPHL.
8. The defendants submitted that the plaintiff has failed to conduct its own due diligence by inquiring with the Fiji Medical Council to determine whether or not

SSPHL had provided an insurance cover, and that the plaintiff has not shown that the document exists or that it is in the possession, custody or power of the defendants as required under the rules.

9. Order 24 rule 7 of the High Court Rules 1988 states:

7 (1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it.

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.

(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.

10. The joint venture agreement dated 12 July 2012 is an agreement between the Republic of Fiji and SSPHL. Paragraph (g) of clause 3 of the agreement states, "Government agrees to obtain a separate insurance and pay for its premium to secure loss in the joint venture activity". Paragraph (c) of clause 4 of the agreement states, "SSPHL agrees to appoint, arrange and ensure that all medical personnel designated by the SSPHL to undertake the services under this agreement registered and have medical indemnity insurance pursuant to the provisions of the Medical and Dental Practitioners Decree 2010 of Fiji".

11. In my view, it would have been desirable had the affidavit given on behalf of the defendants stated whether SSPHL made available a medical indemnity insurance to CWM hospital as undertaken in the joint venture agreement. If the defendants do not have the necessary documents or details, it must be stated in whose possession such information and documents are.

12. If the defendant tenders an affidavit and says it does not have the requested documents, it would in most cases mean the applicant's application has not been successful. However, in this case the defendants do not deny that CWM hospital carried out surgical procedures pursuant to the agreement entered between SSPHL and the government, and the joint venture agreement makes it an obligation on SSPHL to obtain medical insurance indemnity in terms of the Medical and Dental Practitioners Decree.
13. The plaintiff has generally identified the category of the document he seeks. It is proper, in my view, in the circumstances of the case, to exercise the court's discretion and direct the defendants to file an affidavit in the manner set out below. As the plaintiff has taken a number of adjournments to pursue this case, there will be no order as to costs.

ORDER

- A. The defendants are directed to file an affidavit, within 21 days of this decision, specifying the name of the insurance provider from which insurance covers were provided by SSPHL in terms of its joint venture agreement with the government of Fiji on 12 July 2012, and the person or authority in whose custody the insurance documents are kept.

Delivered at **Suva** on this **12th** day of **August, 2022**



M. Javed Mansoor
Judge

