

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

**HBC 106 of 2009 &
HBC 251 of 2008**

BETWEEN: **NAGAN ENGINEERING LTD LIMITED** a limited liability company having its registered office at Old Kings Road Yalalevu, Ba Fiji. **FIRST PLAINTIFF**

A N D: **LEAH LOUISE NAGAN** of Old Kings Road, Yalalevu, Ba, Company Director. **SECOND PLAINTIFF**

A N D: **NEEL HEM RAJ** (father's name Ram Prasad) of Nukuloa, Back Road, Company Director. **FIRST DEFENDANT**

A N D: **NIRMALA DEVI RAJ** (father's name Ram Rup) of Nukuloa, Back Road, Ba, Fiji, Company Director. **SECOND DEFENDANT**

A N D: **NAGAN FERROALLYS (FIJI) LIMITED** a limited liability company having its registered office at Nukuloa Back Road, Ba, Fiji **THIRD DEFENDANT**

A N D: **MISHRA PRAKASH & ASSOCIATES** a firm of Solicitors having its offices in Ba, Lautoka and Suva. **FOURTH DEFENDANT**

Appearances: Ms. Lidise for the Plaintiffs in HBC 106/09 and Defendants in HBC 251/08
 Ms. Sandhya on instructions of Samuel K. Ram for the 1st, 2nd and 3rd Defendants in HBC 106/09 and for Plaintiffs in HBC 251/08
 Ms. Naidu on instructions of Mishra Prakash & Associates for 4th Defendant in HBC 106/09.
Date of Hearing: 05 September 2022
Date of Ruling: 14 October 2022

R U L I N G

1. The fourth Defendant applies to strike out the claim against it.
2. The background to the Plaintiff's claim against the fourth Defendant is outlined in my Ruling dated 18 February 2010 at paragraphs [1] to [8] as follows;

- [1] This is the 4th Defendant's (**Mishra Prakash & Associates**) application that all claims against it in the statement of claim be struck out with indemnity costs. Mishra Prakash relies on the following grounds:-
- (i) the statement of claim is statute barred pursuant to **section 4** of the **Limitations Act**.
 - (ii) Mishra Prakash has or had at not time at all exposed itself in a conflict of interest situation nor did it ever breach its fiduciary duty or duties to the Plaintiffs as alleged in paragraph 7 of the statement of claim.
 - (iii) alternatively – the statement of claim is based on an alleged solicitor-client relationship or contract and is a totally separate cause of action from those pleaded against the other Defendants
- [2] The 1st Plaintiff company, Nagan Engineering (Fiji) Limited ("**NE (Fiji) Ltd**") was incorporated in the mid 1960s. It was founded by the 2nd Plaintiffs late husband. When he passed on, the 2nd Plaintiff, Mrs. Leah Loiose Nagan (**Mrs. Nagan**), took over the reins of **NE (Fiji) Ltd**.
- [3] At some point in time, the 1st Defendant (**Neel Hem Raj**) became involved in **NE (Fiji) Ltd** and 1000 shares were to be issued to him, allegedly on the advice of the 4th Defendant.
- [4] On 31st October 1995, Mrs Nagan and Hem Raj wrote an instruction to Mishra Prakash & Associates to incorporate a new company. According to that instruction, Mrs. Nagan and Hem Raj were to share directorship and shareholding equally.
- [5] On the 13th November 1996, Mishra Prakash & Associates gave various legal advice to Mrs. Nagan vide a letter dated the same day. Included in that letter was an advice to **NE (Fiji) Ltd** to transfer **Certificate of Title No. 12538** ["**land**"] registered in it's name to a new entity. Mishra Prakash & Associates then advised the Plaintiffs to set up a new entity so it can hold **CT No. 12538**. The purpose of that advice apparently was to keep the land out of any potential FDB creditor action. Acting on that advice, the Plaintiffs then instructed Mishra Prakash to transfer **CT 12538** to **Nagan Ferroalloys (Fiji) Limited** ("**NFFL**") the 3rd Defendant Company. As it turns out, NFFL was incorporated as a result of Mrs. Nagan's and Hem Raj's instructions of 31st October instruction.
- [6] The Plaintiffs say that Mishra Prakash & Associates failed to warn them of the risks they would be exposed to if **NFFL** does not hold the land on trust for **NE (Fiji) Ltd**. They further say that Mishra Prakash & Associates , at about the same time, was receiving certain instructions from Hem Raj to issue an additional share in **NFFL** to his wife Nirmala Devi Raj, which advice Mishra Prakash & Associates later acted upon.
- [7] It is alleged that Mishra Prakash & Associates failed to disclose the said Hem Raj-instruction to Mrs. Nagan. It is claimed that the former should have done so as it potentially undermined her position in **NFFL** which ultimately put **NE (Fiji) Ltd** at risk. The statement of claim pleads that Mishra Prakash & Associates either withheld that instruction deliberately from **NE (Fiji) Ltd** and Mrs. Nagan or negligently failed to disclose it to them. According to the pleadings, had Mishra Prakash & Associates informed the Plaintiffs about Hem Raj's instruction (or the change in the shareholding structure that resulted from it), it would have put **NE (Fiji) Ltd** off from transferring **CT 12538** to **NFFL**.
- [8] As it turns out, some eleven or twelve years after **NE (Fiji) Ltd** transferred the land to **NFFL**, the latter filed a Writ and Statement of Claim in **Lautoka Civil Action 251 of 2008** on a cause of action which, to put it quite simply, is premised on an assertion of its lawful

right as registered proprietor of CT 12538. The Defendants in that case are **NE (Fiji) Ltd**, Mrs. Nagan and Mrs. Nagan's son who has replaced Hem Raj as Managing Director in **NE (Fiji) Ltd**.

3. The fourth Defendant argues that the second Plaintiff died on 29 January 2018 and is therefore unable to continue the action. The fourth Defendant also submits that there has been no application by the personal representatives of the estate of the second Plaintiff to take over the action. The action therefore cannot be sustained.
4. Notably, the Plaintiffs have not filed any written submissions.
5. I observe that the application is filed under Order 25 Rule 9.
6. I also observe that from the nature of the pleadings in the statement of claim, that at all material times, there was undoubtedly a relationship of solicitor-client between the 2nd plaintiff and the 4th defendant. It is the alleged breach of this fiduciary relationship which is at the heart of the Plaintiff's claim against the fourth Defendant.
7. Generally, in a solicitor-client relationship, where the client is given advice by the solicitor, the client places his or her confidence in the advice given and in the solicitor advising. Accordingly, bearing in mind the fiduciary nature of the relationship, the main duty of the solicitor is to act in good faith and loyalty to the client.
8. The latin phrase: *omnia praesumuntur rite esse acta* would appear to apply. That is, that while the burden of proving fraud normally lies on the party alleging it, there is an exception when it comes to a fiduciary relationship or undue influence, so that the burden shifts on the dominant party (solicitor) to support the contention that the transaction is valid. In other words, its not on the servient party to impeach the transaction.
9. There is strong argument, applying the above to the established facts in this case (based on the pleadings) – that the burden already falls on the 4th defendant to prove that the advice and all ensuing transactions were valid and not tainted by the 4th defendant's undue influence, breach of fiduciary duty/confidence, negligence, collusion etc. I am not inclined to strike out the claim against the 4th defendant. Application struck out. Parties to bear their own costs.



Anare Tuilevuka
JUDGE
Lautoka

14 October 2022