

IN THE RESIDENT MAGISTRATE'S COURT
AT SUVA-CIVIL DIVISION

Civil Action No. MBC 23 of 2018

BETWEEN: **RATSUN HOTELS LIMITED** a limited liability company having its registered office at 411 Fletcher Road, Nabua, Suva and carries on business of a hotelier at Namaka, Nadi as “Ratsun Nadi Airport”

PLAINTIFF /RESPONDENT

AND: **NISCHAY TAHAL** of Lot 16, Koroba Street, Nakasi, Airline Pilot.

1st DEFENDANT/ APPLICANT NO.1

AND: **ABHISHEK ABHIMANU** of Lot 16, Koroba Street, Nakasi, Businessman.

2nd DEFENDANT/APPLICANT NO.2

For the Plaintiff/Respondent : Mr. C.B. Young (*Young & Associates*)

For the Defendants/Applicants: Mr. V. Kapadia (*Messrs Kapadia Lawyers*)

Date of Hearing : 23rd March 2021

Date of Ruling : 13th April 2021

Ruling on the issue of Discovery

(For the purposes of this decision, this court shall not mention the documents sought to be discovered as the same may be financially sensitive to one or both parties.)

The Parties Arguments

1. The Applicants have filed an amended motion seeking that the Respondent files and serves an Affidavit which discloses certain documentation.
2. In fact a total of eleven (11) classes of documents are being sought. This is stated upon perusing the list expounded upon in the Amended Notice of Motion which is part of the Court record. The list as a result shall not be regurgitated in this ruling.

3. This Court upon perusing the application has identified that the premise of the Application as garnered from the Affidavit¹ filed in support, is stated at paragraph eight (8) of the said Affidavit. It is prudent to re-state the same herein as follows:

“8. THAT the documents requested in our Solicitors emails dated 21st July 2020 are essential to the Defence of the Defendants which will tend to show that payments for the accommodation charges have all been paid by Kalabo Investment Limited to the Plaintiff as agreed by Kalabo Investment Limited with me”

4. Further to the above, at Annexure A of the Affidavit (in support of the amended motion) is the Affidavit² filed in support of the original motion. Paragraphs 7 and 8 from that Affidavit are particularly instructive towards the need for discovery and as such this Court regurgitates the same as follows:

“7. THAT the Plaintiff has failed to disclose relevant documents required by the Defendants to be presented in Court to show that the payments were already made by Kalabo Investments Limited to the Plaintiff on behalf of the Defendants particularly as the 2nd Defendant as Chief Financial Officer of Kalabo Investments Limited always had a room available for him in the Plaintiff’s Hotel. The directors and shareholders of Kalabo Investments Limited of which the 2nd Defendant was Chief Financial Officer.

8. THE signed Financial Statements of the Plaintiff for the years 2016 and 2017 including the Debtors Summary for those years will show that Kalabo Investments Limited had paid for those charges claims which is made in this Action.”

5. The regurgitated deposition stated in the above mentioned paragraphs points to the direction that the application is necessitated to mount a proper defence.
6. There is also a suggestion/allegation via the Affidavit of Abhishek Abhimanu issued on 21st February 2021 that certain invoices have been redacted from its former classification.
7. At this juncture this court turns to consider the Statement of Defence³ of the Applicant. Particularly paragraphs 2,3 and 4 which is re-stated verbatim as follows:

“2. IN reply to paragraph 7 of the Claim, the Defendants state that the Managing Director of the Plaintiff and Kalabo Investment Limited (Rattan Deo) and the 2nd Defendant agreed prior to the provision of the accommodation and related services that they were to be provided to the 1st and 2nd Defendants at the costs of Kalabo Investment Limited. The Plaintiff agreed to charge Kalabo Investment Ltd for accommodation provided to the 1st and 2nd Defendants and did so. No invoices were ever issued to the 1st or 2nd Defendant at any time.

¹ Affidavit in support of Amended Motion for Discovery deposed by Abhishek Abhimanu issued on 20th October 2020.

² Affidavit deposed by Abhishek Abhimanu issued on 17th December 2018.

³ Issued on 28th February 2018

3. AT all material times the second Defendant was employed by Kalabo Investment Limited as its Chief Financial Officer and he was entitled to accommodation in a hotel owned by a subsidiary of Kalabo Investment Limited. The Plaintiff has not provided full particulars of the accommodation and related services provided to the Defendants and paid for by Kalabo Investment Limited and the Defendants request particulars of the same.

4. THE 1st and 2nd Defendants deny the allegations made in paragraph 8 of the Claim. The 1st Defendant states that he is not liable to pay for the accommodation and related services provided by the Plaintiff when he stayed at the hotel of the Plaintiff. The bookings were made by Kalabo Investment Limited for the 2nd Defendant who had approval of the Plaintiff and/or Kalabo Investment Limited to allow the 1st Defendant to use the accommodation and related services of the Plaintiff's hotel.”

8. The Applicants premised the above-mentioned position in terms of specific discovery on discussions from the decisions in *Singh v Minjesk Investment Corporation Ltd & Anor*, High Court Civil Action No. HBC 148 of 2006; *Parvati Manilal Lallu Ranchod v Sundar Lal Lallu* Suva High Court Civil Action No. HBC 488 OF 1991 at page 3; *Wakaya Ltd v Nusbaum* HBC 256 of 2010; and *Savu v Narayan* [2016] FJHC 1070; HBC113.2015 (25 November 2016).
9. The discussions stated above-herein highlight the reasons in favour of the application as proposed by the Applicants.
10. In opposition to the application, the Respondent in two Affidavits⁴ have categorically stated that relevancy with reference to the claim only requires them to discover documents which falls within the claim period, which are relevant to the proceedings and are those which are in their possession (i.e. documents that exist).
11. The claim period as highlighted at paragraph 7 of the claim falls between the 31st of July 2016 and 1st January 2017.
12. The relevant documents in terms of the amended motion have been listed at paragraph 6 of the Affidavit of Ashnita Deo which was issued on 26th April 2019.
13. Further in the Affidavit of Ashnita Deo issued on 17th November 2020 as per paragraph 7 it is deposed that 34 documents have been discovered. Those documents and the ones mentioned at paragraph 11 above-herein are relevant to the claim according to the Respondent's.
14. The Respondent have also set out their legal position premised on their above-mentioned position as follows:

⁴ Affidavits of Ashnita Deo issued on 26th April 2019 and 17th November 2020.

- i. “It must appear to the Court from evidence or from the nature or circumstances of the case that the documents exist: *British Association of Glass Bottle Manufacturers Ltd v Nettlefold*, [1912] AC 709 at 714; *Mulley v Manifold* (1959) 103 CLR 341 at 343⁵”;
- ii. “The Applicant’s affidavit must offer substantial assistance in establishing whether the particular documents to which the application refers exist and relate to a matter directly relevant to an issue in the action: *Beecham Group Ltd v Bristol-Myres Co* [1979]VR 273 at 279 and *Mulley v Manifold* (1959) 103 CLR 341 at 344⁶”;
- iii. Further disclosure would be determined as essential from relevant issues emerging from the pleadings in the proceedings: *Harrods Limited v Times Newspaper Limited and others* [2006] EWCA 294 at [12]⁷;
- iv. If the application seeking discovery were a ‘*mere fishing expedition*’, that is, it is general in purpose and unrelated to a matter in question, it would not ordered: *Hooker Corporation Ltd v Commonwealth* (1985) 61 ACTR 37 at 44-48 at page 47⁸;
- v. The level of disclosure, that is, what measure of disclosure should be made and to whom and upon what terms, was essential to protect trade secrets as well as to not abuse the discovery process: *Church of Scientology of California v Department of Health & Social Security* [1979] 3 All ER 97 at 106, 107,113,114 & 116⁹; and
- vi. “A request for a company to discover virtually all of its financial records was refused as too wide and oppressive: *A-G v North Metropolitan Tramways Co* (1892) 3 Ch 70 at 73¹⁰”.

15. The discussions stated above-herein highlight the reasons raised in objection by the Respondent to the application of the Applicants.

The Law and Analysis

16. The Application is made pursuant to Order 25 Rule 5 of the *Magistrates Court Rules 1945*. The same is regurgitated herein as follows:

“ **Discovery of Documents**

5. The court may order any party to the suit to make discovery, upon oath, of the documents which are or have been in his possession or power relating to any matter in question in the suit.”

⁵ Paragraph 16 of the submissions by the Respondent

⁶ Ibid - para. 17

⁷ Ibid – para.18

⁸ Ibid – Para 19

⁹ Ibid – para.21

¹⁰ Ibid – para. 24

17. Master Tuilevuka (as he was then) in ***Westside Motorbike Rentals (Fiji) Limited v Toganivalu Civil Action No, 55 of 2008*** laid out the principles for Discovery as follows;

“[7]. Discovery can be sought at any stage of a proceeding even after a judgement or order in an action has been made (see ***Singh v Minjesk Investment Corporation Ltd & Anor- High Court Civil Action No. HBC 148 of 2006*** where Master Udit cited *Korkis –v- Wer & Co. [1914] LT 794* as authority for this position).

[8]. The following principles emerge from ***Singh v Minjesk Investment Corporation Ltd & Anor- High Court Civil Action No. HBC 148 of 2006***. The onus initially is on the applicant to establish the following by way of affidavit evidence:

(i) **identify clearly** the particular document or documents or class of documents that he seeks from to be discovered by the opposing party (see ***Order 24 Rule 7 (1)***).

(ii) **show a prima facie case** that the specific document or class of documents do **in fact exist or have existed** (see ***Order 24 Rule 7 (1)***).

(iii) **Establish that these documents are relevant** in the sense that **they relate to the matter in question in the action**. In other words, the information in the document must either directly or indirectly enable the applicant either to advance his own case or damage the case of his or her adversary. Alternatively, it is sufficient if the information in the document is such that it may fairly lead to a train of enquiry which may have either of these consequences. The relevance of a document is to be tested against the issues and/or questions raised by the pleadings (see ***A.B Anand (Christchurch) Ltd –v- ANZ Banking Group Limited (1997) 43 FLR 22 30 January 1997***).

It is important to note that whether or not any particular document is admissible or inadmissible is immaterial to its discoverability. It is enough if the document is likely to throw some light on the case (see ***Volume 13 paragraph 38 of Halsbury’s Laws of England- 4th Edition***) page 34 s cited in *Singh v Minjesk*).

(iv) **show that** these documents were in the physical possession, custody (i.e. the mere actual physical or corporeal holding of the document regardless of the right to its possession) or power (i.e. the enforceable right to inspect it or to obtain possession or control of the documents from one who ordinarily has it in fact) of the opposing party (see ***Order 24 Rule 7 (3)***).

[9]. Courts will not allow the discovery process to be used towards assisting a party upon a fishing expedition such as to fish for witnesses or a new case (see ***Martin and Miles Martin Pen Co. Ltd v Scrib Ltd [1950] 67 RPC 1-7*** as cited in ***Singh v Minjesk***), *Calvet –v- Tomkies [1963] 3 All ER 610*.

Nor will discovery be ordered in respect of documents which are not related to or may not affect the actual outcome of the action: ***Martin and Miles Martin Pen Co. Ltd.- v- Scrib Ltd. [1950] 67 RPC 1-7***. Furthermore, discovery will also be prohibited if it is for a general purpose of enabling a party. ”

18. Considering the above authority the Court now asks the following questions.

19. *Have the Applicants been able to clearly identify the particular document or documents or class of documents that they are seeking to discover?*

20. This is answered in the affirmative, as the amended motion filed by the Applicants has itemized all the documents that they seek.

21. *Have the Applicants shown a prima facie case that the specific documents or class of documents do in fact exist or have existed?*

22. The Affidavits filed in opposition of the Applicants application highlight that documents itemised under numbers 1, 2, 3 and 5 do not exist. The remainder of the items appear to be in their possession or custody of the Respondent.
23. Under this head, the Court is not concerned with the items which the Respondent asserts exist however only the ones which the Respondent states does not exist.
24. The discussion in *Westside Motorbike Rentals (Fiji) Limited v Toganivalu (supra)* allude to the fact that the onus is on the Applicant to establish the existence of the documents via their Affidavit.
25. The Affidavits deposed on behalf of the Applicants make no reference to the existence of the items asserted by the Respondent as non-existent (i.e. Items numbered 1, 2, 3 and 5). In fact the deponent of the Affidavit whom had held a senior position within the Respondent's company, suggesting that most transactions were based on verbal discussions does not assist the Applicants in any manner.
26. It therefore is clear that the Applicants are making bare assertions, as highlighted in *Bidder v Bridges* (1884) 26 Ch D 1 and which was cited with approval in *Trade Air Engineering (West) Ltd v Mechanical Services Ltd* [2013] FJHC 318; Action 338.2003 (6 June 2013).
27. As a result of these bare assertions, no weight can therefore be placed upon the same. This means the Applicants have not been able to show on a prima facie basis that Items numbered 1, 2, 3 and 5 had existed.
28. Those items are deemed undiscoverable as a result.
29. *Have the Applicants established that the remaining documents are relevant in the sense that they relate to the matter in question in the action?*
30. The Respondents have contended that Items numbered 4, 6, 8 (c) to (e), 9 [as it relates to a person who is not a party to the proceedings] and 11 (a) to (d) are not relevant to the claim.
31. The reasons which have been adopted by the Respondents in declaring that the above mentioned documents are not relevant are varied. This court summarises their position as follows:
 - i. Item 4, 6, 11 (a) to (d) are deemed to be outside the claim period.

- ii. Item 8 (c) to (e) are deemed to be not directly related to the suit and the discovery of the same would be oppressive; and
 - iii. Item 9 (as it relates to a non-party) has no relevance to the suit.
32. In the *Westside Motorbike Rentals (Fiji) Limited v Toganivalu (supra)* case identified that the document/s sought to be discovered could either directly or indirectly assist the party seeking the same. However, to determine the question of relevancy the court will have to look at the issues and/or questions raised in the pleadings.
33. This Court therefore directs its attention to paragraphs 7 and 11 above-herein.
34. Upon gleaning the same it is sufficiently clear that the claim period falls between between the 31st of July 2016 and 1st January 2017. The sum claimed is a result of the price of accommodation for a room used by the 1st Applicant in the Respondents Apartment, which the Applicants are stating were given free of charge.
35. At this stage a mere reading of the documents sought to be discovered as highlighted under paragraph 31 and placing relevancy via the pleadings is a difficult task.
36. As such adopting the position in *Westminister Airways Ltd v Kuwait Oil Co Ltd* (1950) 2 All ER 596 (CA) at 603 per Jenkins LJ, the Court has a discretion to call for the documents itself to decide the objection¹¹.
37. This the Court shall do for the documents listed under paragraph 31 prior to making any a determination on the issue of relevancy.
38. Further directions shall be provided hereinafter.
39. The remainder of the Items numbered 8, 9, 10 & 11 (e) & (f) as deposed by the Respondent shall be discovered however they wish to do so upon an order for confidentiality. As there is no real conflict on this issue the same shall be ordered by the court.
40. Item numbered 7 has been provided.
41. In light of the above discussions there is no need to consider whether the documents as itemised were in physical custody of the Respondent.(Refer to paragraph 22 above-herein)

¹¹ Paragraph 24 of the Respondent's submission

Conclusion

42. In summary this is the decision of the Court:

- i. Documents itemised under numbers 1, 2, 3 and 5 shall not be discovered;
- ii. Documents itemised under numbers 8, 9, 10 & 11 (e) & (f) shall be discovered however this shall be executed via a confidentiality agreement;
- iii. Documents itemised under number 7 has been discovered;
- iv. Documents itemised under numbers 4, 6, 8 (c) to (e), 9 [as it relates to a person who is not a party to the proceedings] and 11 (a) to (d) shall be inspected by the court prior to a determination. The documents shall be provided to the Court directly by the Respondent within 28 days (11th May 2021). A ruling shall thereafter be given 7 days thereafter (18th May 2021).

43. The court so orders.

44. Seven (7) days to appeal.


JEREMIA .N.L. SAVOU
Resident Magistrate

