

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA153/2017
[2018] NZCA 583**

BETWEEN MUHAMMAD SHAMSUD-DEAN
 SAHU KHAN
 Appellant

AND MOHAMMED SHARIFF
 Respondent

Hearing: 27 June 2018

Court: French, Duffy and Katz JJ

Counsel: Appellant in person
 No appearance for Respondent

Judgment: 13 December 2018 at 3 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Dr Sahu Khan claims that, as a result of fraudulent misrepresentations made to him by the defendant Mr Shariff, he suffered significant loss. He issued proceedings against Mr Shariff in the High Court, seeking recovery of damages in excess of FJD 650,000.

[2] Mr Shariff did not file a statement of defence and the case proceeded by way of formal proof before Fitzgerald J. In her decision, the Judge held the claim had not been proved and declined to grant any relief.¹

[3] Dr Sahu Khan now appeals the decision on the grounds that the Judge's analysis was flawed. In particular, he says the Judge should have accepted his evidence because it was uncontradicted.

Background

[4] Dr Sahu Khan is a lawyer. He practised in Fiji, where he had a high profile and where he came to know Mr Shariff, before emigrating to New Zealand in May 2011.

[5] Dr Sahu Khan contended that Mr Shariff contacted him in late 2012 and early 2013 claiming to be well acquainted with Fiji's Prime Minister and Attorney-General. He also allegedly told Dr Sahu Khan that in view of the latter's legal qualifications, the Prime Minister and Attorney-General wished to appoint him to the Fiji Constitutional Review Committee and/or as Chief Legal Officer to the Fiji Government. It was said the annual salary would be in the vicinity of \$3 m.

[6] According to Dr Sahu Khan, Mr Shariff also told him that in light of Fiji's political situation, the Prime Minister and Attorney-General wanted to conduct the dealings relating to the appointment indirectly via a representative of Dr Sahu Khan based in Fiji. Dr Sahu Khan accordingly appointed Mr Shariff as his representative.

[7] Then followed a series of representations about various sums that Mr Shariff told Dr Sahu Khan he needed to pay in order to facilitate the appointment. These representations were alleged to have been made between late 2012 and mid 2015. Dr Sahu Khan told the Judge he trusted Mr Shariff and in reliance on the representations he forwarded a total of approximately FJD 173,000.

¹ *Sahu Kahn v Shariff* [2017] NZHC 294 [HC decision].

[8] No announcement of any appointment in favour of Dr Sahu Khan was however ever made. Dr Sahu Khan then issued proceedings in tort for deceit, seeking recovery of all the money he had paid to Mr Shariff. He also sought recovery in deceit of a further sum of FJD 480,000 which he claimed Mr Shariff had promised to pay him as special damages in the event the appointment did not eventuate.

The High Court decision

[9] Justice Fitzgerald identified the elements of the tort of deceit as:²

- (a) False representation (as to a past or existing fact) made by a defendant who knew it to be untrue or had no belief in its truth or who was reckless as to its truth.
- (b) Intention that the plaintiff should act on the representation.
- (c) Action by the plaintiff in reliance on the representation causing loss.

[10] On appeal, Dr Sahu Khan acknowledged this was a correct statement of the law.

[11] Having identified the elements of the tort, the Judge then turned to the evidence.

[12] In support of his claim, Dr Sahu Khan had filed an affidavit verifying the contents of his statement of claim and annexing a large number of emails exchanged between him and Mr Shariff regarding the proposed appointment.

[13] It is fair to describe the statement of claim as disorganised and discursive. Further, some of the emails adduced were not relevant, they were not in a clear or chronological order, some were incomplete copies, others were not exhibited in chronological order within their own chain and some email chains had missing pages.

² At [22]–[23]; citing *Amaltal Corp Ltd v Maruha Corp* [2007] 1 NZLR 608 (CA) at [46]–[50].

In his affidavit, Dr Sahu Kahn deposed that he had been unable to annex all relevant documents because some had been misplaced “by the Typist and/or myself”.

[14] We note too that there are unexplained inconsistencies between the amounts claimed in the statement of claim and the figures in the affidavit.

[15] Faced with these difficulties, the Judge marshalled the evidence as best she could by preparing a two and a half page schedule in table form with three columns. The first column contained a summary of each representation as pleaded in the statement of claim. Alongside each representation the Judge summarised in a second column the written evidence supporting the existence of the pleaded representation. The table contained a third column headed evidence of reliance/loss. For ease of reference a copy of the Judge’s schedule is attached.

[16] The Judge said she was satisfied on the balance of probabilities that six of the representations pleaded had been made by Mr Shariff and that Dr Sahu Khan had relied on them by paying money to Mr Shariff.³

[17] The Judge said she was not however satisfied that there was sufficient evidence to justify a finding that the representations were false at the time each was made or, even if they were false, that Mr Shariff knew they were false.⁴

[18] As regards the claim for special damages, the Judge held that these were not recoverable as a matter of law in tort.⁵

[19] She therefore dismissed the claim in deceit.

[20] Finally, the Judge considered another unrelated claim made by Dr Sahu Khan against Mr Shariff regarding recovery of loan monies. The statement of claim alleged that in 2012 a company owned by Dr Sahu Khan’s family paid Mr Shariff to register

³ At [37]–[38].

⁴ At [47]–[49].

⁵ At [50]; relying on *Livingstone v The Rawyards Coal Co* (1880) 5 AC 25 (HL) at 39; and *Attorney-General v Geothermal Produce NZ Ltd* [1987] 2 NZLR 348 (CA) at 359.

a mortgage on the company's behalf. The statement of claim alleged the mortgage was never registered.

[21] The Judge held there was also insufficient evidence to support this claim and accordingly declined to grant any of the relief sought.⁶

Analysis

Our approach

[22] As Dr Sahu Khan rightly emphasised, in determining this appeal we must conduct our own assessment of the evidence in accordance with the principles laid down in *Austin, Nichols & Co Inc v Stichting Lodestar*.⁷

[23] We do not however agree with a further submission that because the claim proceeded by way of formal proof, a simple assertion by Dr Sahu Khan as to the correctness of the contents of the statement of claim was sufficient to prove his claims. The Court must still satisfy itself regarding the plaintiff's evidence in much the same way as if the proceeding had gone to trial. It is not the case that allegations of fact made in a statement of claim are deemed to be admitted.⁸ Particular care is needed with allegations of fraud.⁹

The claim relating to the loan

[24] We turn first to the claim relating to the loan.

[25] In considering this claim, the Judge appears to have confused what on our interpretation of the statement of claim appears to be two different transactions. The confusion is understandable given the way the information was presented to her. The statement of claim details two loans. As best we can tell, the first, a 2010/2011

⁶ At [54].

⁷ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4]–[5] and [13].

⁸ *Ferreira v Stockinger* [2015] NZHC 2916 at [35]; *Neumayer v Kapiti Coast District Council* [2013] NZHC 1106 at [8]; and *Chen v Zhong* HC Auckland CIV-2010-404-1995, 14 November 2011 at [39].

⁹ R A Osborne and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR5.26.08(1)].

loan for tenancy 7412 in Lautoka, is pleaded only by way of background and does not form part of any claim. Some of the Judge's reasons for dismissing the claim however related to this loan. The second loan is an advance relating to CT1255 in Nadi and is alleged to have been made in 2012. This second loan appears to be the subject of the claim.

[26] Having assessed the merits of the claim relating to the second loan, we are satisfied this claim cannot succeed. There was no evidence other than Dr Sahu Kahn's say so to support the payment, or the giving of the undertaking to register the mortgage. Importantly, there is also no evidence to explain why a payment made by a company could be recovered by Dr Sahu Kahn suing in his own name.

[27] For completeness, we should add that if we are wrong in our interpretation of the statement of claim — and we note Dr Sahu Kahn did not suggest on appeal that the Judge had confused two different transactions — we consider there was also insufficient evidence to support any claim relating to the 2010/2011 loan. A mortgage deed exhibited to the affidavit in fact appears to contradict it by suggesting a mortgage was in fact registered.

The claim relating to the appointment

[28] We have considered the evidence pertaining to the representations and concur with the Judge that, at best for Dr Sahu Kahn, only six of the alleged representations and associated payments were established on the evidence. The six representations in question are:

- (a) An email on 1 December 2014 representing that payment of \$2,549 by Dr Sahu Khan would result in confirmation of the appointment.
- (b) An email on 10 December 2014 representing that transmission of \$1,635 was required for registration of contract, following which appointment would be announced.
- (c) An email on 15 January 2015 representing that payment of fines imposed by the Independent Legal Services Commission totalling

\$6,500 was required before appointment could be announced. Payment would also resolve matters in the bankruptcy court and complaints to Interpol.

- (d) An email on 16 January 2015 representing that the amount of \$3,750 was payable for the return of a shipment seized by the government.
- (e) An email on 19 January 2015 representing that payment of tax arrears of \$8,868 was urgently required before the appointment could be announced. It was said no other payment was pending.
- (f) An email on 3 February 2015 representing that the Independent Legal Services Commission had ruled that Dr Sahu Khan must pay \$7,500 for breach of trust funds and that the Prime Minister's office required payment within 14 days, following which the announcement would be made.

[29] It is well established that a statement of future intent is not an actionable representation and the emails do make reference to future events.¹⁰ However, as the Judge noted,¹¹ a statement that a payment is currently required in relation to a particular matter is a representation of a present fact. Further, the emails also contain an implicit representation that Mr Shariff has been advised of the various matters by relevant officials in Fiji, which is a representation as to a past and present fact. We are therefore satisfied the emails qualify as representations.

[30] The various payments made by Dr Sahu Khan in reliance on the six representations amount in total to FJD 30,802.00.

[31] The next question is whether there was sufficient evidence to justify finding that any of the representations was false at the time it was made and that Mr Shariff had the requisite dishonest intention.

¹⁰ *Amaltal Corp Ltd*, above n 2, at [47].

¹¹ HC decision, above n 1, at [38].

[32] As already mentioned the Judge held that, on the basis of the evidence before her, she was not prepared to draw an inference of dishonesty in respect of the six representations even if each of them was false at the time it was made, something she said was also not clear.¹²

[33] The Judge acknowledged that the representations viewed as a whole seem implausible and gave rise to suspicion and concern but in terms of the proven facts from which to infer falsity and dishonesty she said there were only two such proven facts, namely (a) the fact that no appointment was ever announced and (b) confirmation obtained by Dr Sahu Khan that a document Mr Shariff sent him purporting to be a sealed costs order made by the Independent Legal Services Commission was a forgery.¹³ In the Judge's view, the two matters did not constitute the clear and cogent evidence she required before being prepared to make a finding of dishonesty. In particular, the Judge said she could not rule out the possibility that Mr Shariff himself was being misled as to the correct position or was being told the correct position but that position kept changing.¹⁴

[34] In coming to this conclusion, the Judge did not consider whether inferences could be drawn from Mr Shariff's failure to answer the allegations and defend the claims. It is well established that the silence of one party in face of the other party's evidence may add weight to that evidence in relation to matters which are or likely to be within the knowledge of the silent party and about which that party could be expected to give evidence.¹⁵

[35] However, before that principle can apply, a prima facie case must first be established,¹⁶ and we are not satisfied given the state of the evidence that a prima facie case of falsity and dishonesty was established.

[36] First, we consider the Judge was wrong to accept that the information before her established the fact of a forgery. All that was provided by way of "confirmation"

¹² At [47].

¹³ At [46]–[47].

¹⁴ At [48]–[49].

¹⁵ Colin Tapper *Cross and Tapper on Evidence* (11th ed, Oxford University Press, Oxford, 2007) at 43–44; and see *Ithaca (Custodians) Ltd v Perry Corp* [2004] 1 NZLR 731 (CA) at [154]–[156].

¹⁶ Tapper, above n 15, at 43–44.

was the copy of an email sent from a private Gmail account purporting to come from the Independent Legal Services Commissioner regarding a document which was only exhibited in an incomplete form.

[37] Second, we have considered whether the inherent implausibility of the statements made by Mr Sharriff could be relied upon to draw the necessary inferences. One difficulty with that is Dr Sahu Kahn — who has practised law in Fiji for many years and was well versed in Fijian practices — considered them plausible. As the Judge noted,¹⁷ there was no evidence as to practices in Fiji that might reflect on the implausibility of the statements, including the potential for the appointment to have been made in the first place, relevant salary levels, the system of contract registration, and insurance cover requirements in Fiji. There was also no evidence as to Dr Sahu Kahn's dealings with the Independent Legal Services Commission and its practices. We conclude that inferences cannot be safely drawn from the apparent implausibility of the statements.

[38] That then leaves the evidence that Mr Shariff made statements about the impending nature of the appointment with no announcement ever being made. That is certainly an item of evidence but on its own cannot amount to a prima facie case, especially given the unsatisfactory and unreliable evidence provided by Dr Sahu Khan.

[39] We therefore conclude that, notwithstanding Mr Shariff's failure to defend the claim, the Judge was correct to refuse to enter judgment against him.

Claim for special damages

[40] In addition to recovery of the monies he paid Mr Shariff, Dr Sahu Khan also sought recovery of money which he alleged Mr Shariff had promised to pay him in the event the appointment did not eventuate. The sum promised was alleged to be FJD 480,000.

[41] As the Judge pointed out, this claim styled as a claim for “special damages” was highly problematic.¹⁸ It was pleaded as part of the claim in deceit, yet arguably a

¹⁷ HC decision, above n 1, at [48].

¹⁸ At [51].

statement of future intent and therefore not a representation. Further, in so far as Dr Sahu Kahn relied on the promise, he did so by continuing to pay Mr Shariff the money the latter was demanding. Therefore, there was no additional detriment to Dr Sahu Khan arising from the alleged promise.

[42] Correctly analysed, this claim for special damages was in essence a claim for breach of contract. However, breach of contract was not pleaded. Further, on the evidence, the exact terms of the contract were not certain. In addition, it was doubtful the promise was enforceable, being in the nature of a penalty.¹⁹

[43] We agree with Fitzgerald J that the claim for special damages also cannot succeed.

Result

[44] The appeal is dismissed.

¹⁹ See Stephen Todd “Remedies” in Jeremy Finn, Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington 2018) 815 at [21.2.6].

SCHEDULE

PLEADED CLAIM			EVIDENCE OF REPRESENTATION		EVIDENCE OF RELIANCE/LOSS	
ASOC para	Amount claimed (FJD)	Particulars of claim	Date of [Mr] Shariff's email	Nature of Mr Shariff's representation to Dr Sahu Khan (FJD, unless otherwise specified)	Date of Dr Sahu Khan's transfer	Value that Dr Sahu Khan transferred (FJD)
9	\$13,857.13	Finalisation of existing claims against Dr Sahu Khan (no date)	No evidence of corresponding representation		No evidence of corresponding reliance/loss	
11(iv)	\$5,098.00	Insurance premium in respect of hotel accommodation (no date)	No evidence of corresponding representation		No evidence of corresponding reliance/loss	
11(vii)	\$7,500.00	Security to be deposited with government (no date)	No evidence of corresponding representation		No evidence of corresponding reliance/loss	
11(ix)	\$8,600.00	To discharge claim against Dr Sahu Khan or his law firm (November 2012)	No evidence of corresponding representation		No evidence of corresponding reliance/loss	
12(i)	\$2,688.00	Fees to register as an applicant for the position (13 November 2014)	13 November 2014	\$2,698 for "registration fee"	No evidence of corresponding reliance/loss	
12(vi)	\$1,500.00	Costs in relation to Appointment (14 November 2014)	No evidence of corresponding representation		15 November 2014	\$1,500.00
14(i)	\$1,635.00	Registration of proposed contract (11 December 2014)	10 December 2014	\$1,635 for registration of contract	10 December 2014	\$1,635.00
14(ii)	\$285.00	Airfare for Mr Shariff from Nadi to Suva in relation to Appointment (11 December 2014)	11 December 2014	\$285 for airfare	No evidence of corresponding reliance/loss	

PLEADED CLAIM			EVIDENCE OF REPRESENTATION		EVIDENCE OF RELIANCE/LOSS	
ASOC para	Amount claimed (FJD)	Particulars of claim	Date of [Mr] Shariff's email	Nature of Mr Shariff's representation to Dr Sahu Khan (FJD, unless otherwise specified)	Date of Dr Sahu Khan's transfer	Value that Dr Sahu Khan transferred (FJD)
14(iii)	\$2,698.00	Actual registration fee as an applicant for the position (13 December 2014)	No evidence of corresponding representation		No evidence of corresponding reliance/loss	
14(iv)	\$1,500.00	"... further deposit as advised by the defendant" (23 December 2014)	22 December 2014	\$1,500 "balance to be paid"	Although a \$1,500.00 payment was sent from Indonesia on 23 December 2014, the sender's name on the payment form is "Putu Windayani". There is no evidence that Dr Sahu Khan made the payment, or of his relationship with Putu Windayani or that Dr Sahu Khan experienced loss accordingly.	
14(v)	\$3,750.00	"... further payment as advised by the defendant" (16 January 2015)	16 January 2015	\$3,750 for return and seizure of shipment by government	16 January 2015	\$3,750.00
14(vii)	\$6,500.00	ILSC costs (15 January 2015)	15 January 2015	\$6,500 to resolve ILSC complaints	15 January 2015	\$6,500.00
14(vii) (e)	\$12,500	ISLC fine of \$7,500 and costs of \$5,000	3 February 2015	\$7,500 fine on ISLC complaint	4 February 2015	\$7,500.00
			No evidence for corresponding representation as to the \$5,000 costs		Although a \$5,000.00 payment was sent on 13 February 2016, the sender's name on the form is "Santosh Joshi". There is no evidence of the relationship or other dealings between Dr Sahu Khan and Santosh Joshi. There is no explanation of this, or evidence that Dr Sahu Khan made the payment or experienced loss accordingly.	

PLEADED CLAIM			EVIDENCE OF REPRESENTATION		EVIDENCE OF RELIANCE/LOSS	
ASOC para	Amount claimed (FJD)	Particulars of claim	Date of [Mr] Shariff's email	Nature of Mr Shariff's representation to Dr Sahu Khan (FJD, unless otherwise specified)	Date of Dr Sahu Khan's transfer	Value that Dr Sahu Khan transferred (FJD)
16(i)	\$3,980.00	In response to increased salary for Appointment (to NZ\$4,290,000) (23 March [2015?])	No evidence of corresponding representation		25 March 2015	\$3,980.00
17	\$2,549.00	Insurance contribution (1 December 2014)	2 December 2014	\$2,549 for insurance money	4 December 2014	\$2,549.00
18(i)	\$2,868.00	No particulars.	No evidence of corresponding representation		No evidence of corresponding reliance/loss	
18(i)	\$8,688.00	"Provisional tax" on salary (of \$850,000 per annum)	19 January 2015	\$8,688 in tax on remittance of \$1.5 million	23 January 2015	\$8,688.00
18(c)	\$3,980.00	Registration fees for additional amounts to be paid to Dr Sahu Khan (March 2015)	No evidence of corresponding representation		Appears to be a duplicate of 16(i) above	
20(ii) (a)	\$59,614.00	"Further payments" made in December 2014 and January 2015 (as stated 24 January 2015) No particulars.	Only evidence of representation is Dr Sahu Khan's own statement on 24 January 2015: "I had paid you total cash sums of \$56,914". Insufficient particulars in claim to establish a corresponding representation		Insufficient particulars in evidence of representation to establish corresponding reliance/loss	
22	\$30,020.00	Payments relating to the registration of a mortgage (various dates in 2011 and 2012)	No evidence of corresponding representation		No evidence of corresponding reliance/loss	