

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2016-404-122  
[2017] NZHC 294**

BETWEEN MUHAMMAD SHASUD-DEAN SAHU  
KHAN  
Plaintiff

AND MOHAMMED SHARIFF  
Defendant

Hearing: 14 December 2016

Appearance: MS Sahu Khan, plaintiff in person  
No appearance on behalf of defendant

Judgment: 28 February 2017

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**JUDGMENT OF FITZGERALD J**

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This judgment was delivered by me on 28 February 2017 at 4 pm  
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

To: MS Sahu Khan, Auckland

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## **Introduction**

[1] The plaintiff, Dr Sahu Khan, seeks recovery of \$653,320.13 in damages from the defendant, Mr Shariff. The claim is made in fraudulent representation/deceit and proceeds by way of formal proof.

## **Pleaded factual background**

[2] The pleaded factual background to Dr Sahu Khan's claim is somewhat unusual.

[3] Dr Sahu Khan practised as a barrister and solicitor in Fiji until May 2011, when he migrated to New Zealand as a result of political unrest around that time.

[4] Dr Sahu Khan says he held a range of prominent positions while in Fiji, including the President of the Fiji Law Society from 1982 to 1987; Fiji's representative on the International Centre for Settlement of Investment Disputes; an independent member of a Constitutional Review Committee established in May 1987; and the elected President of the Fiji Football Association for the period October 1985 to October 2011. In the 1970s, he completed a PhD in Law at the University of Auckland, on the Constitution of Fiji.

[5] Dr Sahu Khan came to know Mr Shariff while in Fiji, particularly from around 2007. Their relationship is said to have included some financial dealings, conducted through Dr Sahu Khan's family company which apparently lent money to Mr Shariff, secured by a mortgage over Mr Shariff's land in Fiji.

[6] Dr Sahu Khan says Mr Shariff contacted him in late-2012, claiming to be well acquainted with Fiji's Prime Minister and Attorney-General.

[7] Mr Shariff allegedly told Dr Sahu Khan that, in view of Dr Sahu Khan's qualifications in matters such as constitutional law, the Prime Minister and Attorney-General wished to appoint Dr Sahu Khan to the Fiji Constitutional Review Committee and/or as Chief Legal Officer to the Fiji Government in matters relating

to the constitution (“Appointment”). It is pleaded that Mr Shariff said the salary for the proposed Appointment would be approximately \$3,000,000 per year.

[8] Further, Mr Shariff allegedly told Dr Sahu Khan 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 in Fiji. Dr Sahu Khan accordingly appointed Mr Shariff as Dr Sahu Khan’s representative in Fiji, to deal with matters needing to be arranged before the Appointment could be announced.

[9] Between late-2012 and mid-2015, Mr Shariff is said to have represented to Dr Sahu Khan that Dr Sahu Khan needed to pay over various sums in order to facilitate the Appointment. Dr Sahu Khan says he trusted Mr Shariff and, in reliance on those representations, he paid Mr Shariff some FJD\$173,000. Dr Sahu Khan also alleges that Mr Shariff agreed to pay him FJD\$480,000 in “special damages” in the event the Appointment did not come about. It is these two broad heads of claim that Dr Sahu Khan seeks to recover in these proceedings. I will describe them in more detail, along with the corresponding evidence, later in my judgment.

[10] Ultimately, as the fact these proceedings have been brought demonstrates, no announcement of Dr Sahu Khan’s Appointment was ever made.

### **Procedural background**

[11] The matter first came before Hinton J for a formal proof hearing on 23 November 2016. However, Dr Sahu Khan had not filed any substantive evidence to support his claim.

[12] Given the above, Hinton J directed that the matter be adjourned to enable Dr Sahu Khan to file further evidence and more fulsome written submissions in support of his claim. Hinton J’s minute of 23 November 2016 recorded the position as follows:

[8] Nonetheless, the matter is not straightforward.

[9] I explained to Mr Khan, which he clearly had not understood, that he will need to provide affidavit evidence swearing to the truth of the pleaded agreement and attaching it, along with all relevant correspondence or other documents relating to the agreement. He will need to attach documentary proof of all of the payments made by him (to the fullest extent possible), and obviously he will need to prove the basis on which the monies were all refundable. All relevant and available documents will need to be annexed to the affidavit and sworn as correct.

[10] The plaintiff will also need to prove that the defendant did submit to the jurisdiction of the New Zealand Court, as pleaded, and that to the extent he agreed, the agreement was on all fours with the agreement being sued upon. To the extent the defendant is not being sued on the agreement (for example, if he is being sued in deceit), the plaintiff will need to satisfy the Court it has jurisdiction.

[11] The above comments are only designed to assist. More may be required. It is up to the plaintiff to establish his case.

[13] Further materials were subsequently filed by Dr Sahu Khan. The matter then came before me for a formal proof hearing on 14 December 2016.

### **Preliminary jurisdictional matters**

[14] The Court file contains an affidavit of service confirming that Mr Shariff was personally served with the notice of proceeding and amended statement of claim.<sup>1</sup> The notice of proceeding was also accompanied by the requisite “notice to defendants served overseas”.<sup>2</sup>

[15] Pursuant to r 6.27(k) of the High Court Rules, civil proceedings in New Zealand may be served out of New Zealand without leave where the person to be served has submitted to the jurisdiction of the Court. Dr Sahu Khan’s evidence includes a number of emails in which Mr Shariff consents to the jurisdiction of New Zealand courts in respect of claims relating to the payments and/or the “special damages”. I am thus satisfied on the balance of probabilities that Mr Shariff submitted to the jurisdiction of New Zealand’s courts for the purpose of these proceedings.

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<sup>1</sup> High Court Rules, r 6.1.

<sup>2</sup> Rule 6.31.

[16] Further, and although not relied on by Dr Sahu Khan, there may also have been grounds for jurisdiction on the basis of r 6.27(2)(a), namely:

- (a) When a claim is made in tort and:
  - (i) Any act or omission in respect of which damage was sustained was done or occurred in New Zealand; or
  - (ii) The damage was sustained in New Zealand.

[17] A fraudulent or negligent misrepresentation communicated from overseas is a sufficient act for the purposes of r 6.27(2)(a)(i), where the representation was received and acted upon in New Zealand.<sup>3</sup>

[18] I am also satisfied the Court should not exercise its residual discretion to set aside service on the defendant on the ground of forum non conveniens.<sup>4</sup> Although the proceedings have an obvious Fiji flavour, they also have the necessary New Zealand connection. The alleged misrepresentations were communicated to Dr Sahu Khan in New Zealand, where Dr Sahu Khan is said to have carried out his actions in reliance on them. Further, the damage suffered by Dr Sahu Khan is said to have been incurred here. Given that Mr Shariff did not protest jurisdiction, it would be speculative to assume that proceeding in New Zealand would cause him undue inconvenience, expense, or disadvantage.<sup>5</sup> There is no suggestion of related proceedings on foot elsewhere and, as noted, I am satisfied that Mr Shariff consented to New Zealand's jurisdiction.

[19] I therefore turn to consider Dr Sahu Khan's substantive claim.

### **Deceit/fraudulent misrepresentation**

[20] Dr Sahu Khan's statement of claim pleads as follows:

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<sup>3</sup> *Fitzroy Engineering Ltd v Basic*, HC Wellington CP258/95, 14 May 1996; *Diamond v Bank of London and Montreal Ltd* [1979] QB 333(CA) at 345-346.

<sup>4</sup> *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513 (PC) at 529; see also *Andrew Beck et al* McGechan on Procedure (online looseleaf ed, Brookers) at [6.27.01].

<sup>5</sup> For example, issues such as the location of potential witnesses and documents would depend on the nature of any defence Mr Shariff might propose to advance in response to the claim.

5. The Plaintiff's claims against the Defendant are based on the grounds of:-

Fraudulent representation, false pretences and deceits by the Defendant by misrepresentation to the Plaintiff that in view of the special qualifications of the Plaintiff in constitutional and other relevant matters the Prime Minister and Attorney-General assured the Defendant in the proposed, Appointment of the Plaintiff by the Government of Fiji as a member of the Fiji Constitutional Review Committee and proposed Constitutional Assembly and/or Chief Legal Officer of the Fiji Government in the Constitutional matters.

[21] It is not suggested or pleaded by Dr Sahu Khan that any alleged fraudulent representations made by Mr Shariff induced Dr Sahu Khan to enter into a contract with Mr Shariff. Accordingly, s 6 of the Contractual Remedies Act 1979 does not apply. The issue therefore falls to be considered against the tort of deceit.

[22] In *Amaltal Corporation Ltd v Maruha Corporation*, the Court of Appeal confirmed the elements of the tort of deceit as follows:<sup>6</sup>

- (a) 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 claimant should have acted on the representation; and
- (c) Action by the plaintiff in reliance on the representation.

[23] Obviously, the plaintiff must also have suffered loss as a result of reliance upon the representation.

[24] In this case, Dr Sahu Khan has pleaded what may be construed as an overarching or "global" representation by Mr Shariff, namely that replicated at [20] above. But Dr Sahu Khan does not plead specific reliance on this global representation. Rather, the claim is framed in terms of his reliance on further, more particularised representations made by Mr Shariff which are said to be false at the

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<sup>6</sup> *Amaltal Corporation Ltd v Maruha Corporation* [2007] 1 NZLR 608 (CA).

time they were made.<sup>7</sup> The global representation nevertheless forms part of the background or narrative against which the more particular representations must be considered.

[25] Considering Dr Sahu Khan's claim therefore requires an analysis of the evidence as to each of the representations pleaded, on which he says he relied and suffered loss as a result. Such an analysis involves asking:

- (a) Whether there is sufficient evidence that the representation was made;
- (b) If so, whether it was a representation as to a present or past fact;
- (c) If so, whether the representation was false at the time it was made;
- (d) If so, whether there is sufficient evidence that, at the time the representation was made, Mr Shariff lacked an honest belief in the truth of the representation;
- (e) If so, whether there is sufficient evidence that Dr Sahu Khan relied on that representation; and
- (f) If so, whether there is sufficient evidence of Dr Sahu Khan suffering loss as a result.

[26] In relation to point (b) above, the authorities are clear that an actionable misrepresentation must be a representation as to a present or past fact, ie rather than a representation of opinion or as to future matters.<sup>8</sup> Nevertheless, a statement as to future intention may involve a representation as to the existence of the intention, which is a matter of fact.<sup>9</sup> Similarly, a representation as to an opinion may carry with it a representation that the maker of the representation is in possession of

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<sup>7</sup> See [7] to [22] of the amended statement of claim.

<sup>8</sup> *Amaltal Corporation Ltd v Maruha Corporation*, above n 6, at [47].

<sup>9</sup> *Buxton v The Birches Time Share Resort* [1991] 2 NZLR 641 (CA) at 646; *Karum Group LLC v Fisher & Paykel Financial Services Ltd* [2014] NZCA 389, [2014] 3 NZLR 421 at [29].

sufficient facts to justify that opinion.<sup>10</sup>

[27] I now set out the evidence Dr Sahu Khan has provided in support of his claim.

### **Evidence**

[28] Prior to the formal proof hearing, Dr Sahu Khan affirmed and filed an affidavit annexing a number of emails dated between November 2014 and December 2015, discussing the proposed Appointment with Mr Shariff. Although the emails were adduced as evidence of Mr Shariff's representations to Dr Sahu Khan, some were not directly relevant to issues in the proceedings. The emails were not arranged in a clear or chronological order, and some appeared in the bundle more than once. Some of the emails also give rise to other queries, such as not being within chronological order within their own chain. There are also instances where pages are missing from the chain (as shown by the page numbers in the top right corner of the email chains). Dr Sahu Khan also states in his written submissions that the recipient's email address as shown in the various email chains is Mr Shariff's. There is no evidence of that fact, but for the purposes of this formal proof hearing, I proceed on the basis that that email address does indeed belong to Mr Shariff.

[29] What appears from the correspondence is that at various instances, Mr Shariff requested Dr Sahu Khan to pay certain sums of money to enable the Appointment process to continue. I do not address each of these (numerous) requests and payments individually, but have summarised those which make up Dr Sahu Khan's pleaded claim in a schedule which is annexed to this judgment. In summary, Mr Shariff requested Dr Sahu Khan to make payments to him for matters such as:

- (a) Fees to register the position;
- (b) Contract registration fees;
- (c) Airfares;

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<sup>10</sup> *Ware v Johnson* [1984] 2 NZLR 518 (HC) at 537; *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569 (HC) at 592.

- (d) Tax;
- (e) Insurances premiums in respect of Dr Sahu Khan and his wife; and
- (f) Fines, costs, and expenses relating to proceedings with the Independent Legal Services Commission (ILSC).

[30] A common theme through the correspondence is the continuing delays in the Appointment being progressed and an announcement made, and regular reassurances from Mr Shariff to Dr Sahu Khan that the announcement of the Appointment would be forthcoming soon. Such reassurances were often accompanied by a representation by Mr Shariff that a further sum of money needed to be paid by Dr Sahu Khan, for matters such as those listed above, to enable the Appointment to progress.

[31] Another common theme through the email correspondence is Dr Sahu Khan's increasing frustration at the delays and, it seems, scepticism as to the statements being made to him by Mr Shariff. Nevertheless, Dr Sahu Khan continued to pay moneys to Mr Shariff.

[32] It appears Dr Sahu Khan's frustrations with Mr Shariff resulted in him making a number of requests for Mr Shariff to pay sums of "special damages" in the event that the Appointment did not occur. The email chains indicate that Mr Shariff agreed to these proposals.

[33] Dr Sahu Khan produced a second set of evidence at the formal proof hearing. This evidence was intended to prove Dr Sahu Khan's reliance on Mr Shariff's representations, as well as his corresponding losses. This material should have been filed earlier by Dr Sahu Khan by way of formal affidavit evidence. Nevertheless, I was prepared to grant to leave for Dr Sahu Khan to submit the material to the Court so that I could consider it in the context of his claim. The material consisted of more than 40 receipts or "send forms" from money-transfer companies such as Western Union or MoneyGram. The dates of the documents, which were not adduced in chronological order, range from 13 November 2014 to 2 April 2015. Some forms

record names other than Dr Sahu Khan's in the "sender" column, some are unsigned, and others forms are for identical amounts of money, but have differing senders or are on different but proximate dates.

## **Analysis**

### *Overview*

[34] The jumbled nature of the evidence, along with the rather discursive statement of claim, has not made it easy to consider the evidence in light of the relevant legal principles. I have had to spend considerable time sorting through the information before me.

[35] After comparing the particular representations pleaded in the statement of claim with the evidence Dr Sahu Khan produced to support them, I am not satisfied that the evidence proves the various elements of the deceit claim to the requisite standard. Ultimately, there are just too many gaps in or questions raised by the evidence. Many of the payments pleaded in the statement of claim have either no supporting evidence of Mr Shariff's representations actually being made, or no corresponding evidence of reliance or loss in the "send forms". Indeed, there is no contemporaneous evidence that pre-dates 2014, when many of the allegations relate to 2012. A simple statement in an affidavit by Dr Sahu Khan as to the correctness of the contents of the statement of claim is not sufficient to prove, even on a formal proof hearing, the various factual elements that make up the tort of deceit.

[36] The schedule annexed to this judgment contains my analysis of the evidence in respect of each of the representations which make up the pleaded claim for relief.

### *Representations made/reliance and loss proved*

[37] Having carefully analysed the evidence advanced by Dr Sahu Khan, I am satisfied, on the balance of probabilities, that a small number of Mr Shariff's representations were made to Dr Sahu Khan, and that Dr Sahu Khan paid money to Mr Shariff in reliance on them. These are as follows:

- (a) On 2 December 2014, Mr Shariff said to Dr Sahu Khan in an email:

I as your agent do hereby confirm that the payment of \$2,549.00 from your side would be sufficient as the government would contribute the balance on the insurance cover. Thereafter, your appointment would be confirmed and a letter sent to that effect.

Congratulations on your appointment and please expedite payment.

Thanks.

Kind regards

Mohammed Sharif.

By reply email, Dr Sahu Khan indicated he would make the payment. A completed Western Union transfer form shows that Dr Sahu Khan transmitted FJD\$2,549.00 to Mr Shariff on 4 December 2014.

(b) On 10 December 2014, Mr Shariff emailed Dr Sahu Khan, saying:

You are urgently to transmit \$1635.00 for registration of [contract] upon which your announcement of the appointment will take place. [...]

Please expedite payment as your representative.

Kind regards

Mohammed Sharif.

A completed Western Union form shows that Dr Sahu Khan transmitted FJD\$1,635.00 to Mr Shariff on 10 December 2014.

(c) On 15 January 2015, Mr Shariff emailed Dr Sahu Khan saying:

Dear Dr.,

As spoken to you over the phone and discussed with the commissioner Independent Legal Services Commission your fines as discussed 14/01/15 regarding [...] for miss leading the commission is \$6,500.00 after which your announcement will be done.

The Magistrates matter in the Ba Court would also be finished and the complains to interpol would be finished.

Please, send payments urgently...

In a reply email, Dr Sahu Khan agrees to make the payment. A completed Western Union form shows that Dr Sahu Khan sent FJD\$6,500.00 to Mr Shariff on 15 January 2015.

- (d) On 16 January 2015, Mr Shariff emailed Dr Sahu Khan saying:

Dear Dr.,

As discussed with you this morning the amount of \$3,750.00 is to be payable for the return and seizure of the shipment by government is the only left to be paid.

Dr Sahu Khan reluctantly agreed to make the payment in an email response the same day. A completed Western Union form dated 16 January 2015 shows that Dr Sahu Khan did transfer the sum to Mr Shariff.

- (e) On 19 January 2015, Mr Shariff emailed Dr Sahu Khan, stating:

Dear doc as discussed this morning with governor reserve bank and razim the account \$623 as tax and \$8868 as tax on 1.5 million New Zealand dollars to be send is urgently required before release of funds and announcement of your appointment. their is no other payment pending as clarified.

Thanks

After a series of emails about the tax payments, on 22 January 2015, Dr Sahu Khan agreed to transfer \$8,868.00 to Mr Shariff. A Western Union transfer form completed later that day records Dr Sahu Khan's transfer of the money.

- (f) On 3 February 2015, Dr Sahu Khan received the following email from Mr Shariff:

Dear Doc,

The Independent commission has on 1/02/15 made a ruling on your charge of complaint that you are to pay \$7,500.00 as Breach of Trust Funds. The ruling has been done and sent to PM's Office who have asked to pay the fine in 14 days time.

I have already given your swift code for your payment to be sent to you. Your announcement would be done once the fine is paid.

A Western Union transfer form shows that Dr Sahu Khan duly transferred the money the next day.

[38] I am satisfied that each of the above communications contained a representation by Mr Shariff to Dr Sahu Khan as to a past or present fact. They all involve statements that a payment is required in relation to a particular matter, in order to progress the Appointment, which is a representation of a present fact. All but one of the representations above state that, upon payment of a sum of money, announcement of the Appointment will occur at a certain point in the future. Further, to the extent that such representations are as to future events, they carry with them an implicit representation that Mr Shariff has been advised of such matters by relevant officials in Fiji, which is a representation as to a past or present fact.

[39] Subject to considering the elements of falsity and dishonesty (the latter of which has been described as “the absolute core of the action for deceit”),<sup>11</sup> Dr Sahu Khan’s claim in respect of payments made by him to Mr Shariff would be made out to the amount of FJD\$30,802.00.

*Representations/reliance and loss not proved*

[40] In relation to the other representations that make up Dr Sahu Khan’s claim, I have set out in the attached schedule the reasons why I am not satisfied that the requisite elements of the tort of deceit are made out. By way of summary:

- (a) There is no evidence of the pleaded representation being made (in the case of the representations pleaded at paragraphs 9; 11(iv); 11(vii), 11(ix); 12(iv); 14(iii); 14(vii)(e) (in respect of costs); 16(i); 18(i); 18(c); 20(ii)(a) and 22 of the amended statement of claim); and
- (b) There is no evidence of Dr Sahu Khan’s reliance and resulting payment in response to the particular representation (in the case of the

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<sup>11</sup> *Amaltal Corporation Ltd v Maruha Corporation*, above n 6, at [128].

representations pleaded at paragraphs 9; 11(iv); 11(vii); 11(ix); 12(i); 14(ii); 14(iii); 14(iv); 14(vii)(e); 18(i); 18(c); 20(ii)(a) and 22 of the amended statement of claim).

*Falsity/dishonesty - principles*

[41] In respect of those representations set out at [37] above, I accordingly turn to consider whether Dr Sahu Khan has proved to the requisite standard that the representations were false at the time they were made, and if so, that Mr Shariff lacked an actual and honest belief in the truth of each of those representations at the time it was made.<sup>12</sup> Given the seriousness of an allegation of what is tantamount to fraud, such a claim needs to be supported by clear and cogent evidence.<sup>13</sup> The only evidence advanced by Dr Sahu Khan is his own affidavit, which attaches the various emails. Dr Sahu Khan deposes in his affidavit that he has not been able to annex copies of all relevant documents, as “some of the Documents have been misplaced by the Typist and/or myself”.

[42] Mr Shariff has obviously not given or presented evidence in this case, and there is therefore no direct evidence of his knowledge in respect of the representations. However, it is clear that a court is permitted to draw an inference of dishonesty, and often will be required to draw such an inference, in the absence of a defendant acknowledging their knowledge of the falsity of the representation at the time it was made.

[43] For example, in *Amaltal Corporation Ltd v Maruha Corporation*, the Court of Appeal emphasised that in a case of deceit, the Court is required to make a distinct finding of dishonesty. It also noted that for cases which go to trial, there will rarely be a single document which explicitly represents the element of dishonesty (as cases where there is such hard evidence do not get to trial, for obvious reasons). In such circumstances, the Court confirmed that a court hearing a deceit claim will need to draw an inference as to this element of the tort.<sup>14</sup>

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<sup>12</sup> See for example, *Amaltal Corporation Ltd v Maruha Corporation*, above n 6, at [50]; *Claydon v Smith* HC Auckland CIV-2007-404-6172, 8 May 2008 at [49].

<sup>13</sup> *Newark Engineering (NZ) Ltd v Jenkin* [1980] 1 NZLR 504 (CA) at 509–510; *Amaltal Corporation Ltd v Maruha Corporation*, above n 6, at [69]–[71].

<sup>14</sup> *Amaltal Corporation Ltd v Maruha Corporation*, above n 6, at [134].

[44] As to the process for inferring such dishonesty, the Court referred to and adopted the statement of principle by Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd*.<sup>15</sup>

**Inference must be carefully distinguished from conjecture or speculation.** There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture. [Emphasis added]

*Falsity/dishonesty – application to the facts*

[45] I have considered whether Dr Sahu Khan has satisfied me, on the basis of the evidence filed, that each of the representations referred to at [37] above was false at the time it was made, and if so, whether an inference of dishonesty on the part of Mr Shariff can properly be drawn in respect of it. I am particularly conscious of the need for clear evidence before making such a serious finding.

[46] Dr Sahu Khan did not address, either in his written or oral submissions, the basis upon which I ought to make such findings. However, the particular (proven) facts that might be relied on for concluding that, at the time they were made, each of the representations was false, and for drawing an inference of dishonesty are:

- (a) The continued statements by Mr Shariff as to the impending nature of the Appointment over many months, with no Appointment ever being announced; and
- (b) The fact that Mr Shariff represented to Dr Sahu Khan that the ILSC in Fiji had made a costs award against Dr Sahu Khan which he was required to pay, and a purported order of the ILSC to this effect being provided by Mr Shariff to Dr Sahu Khan. Dr Sahu Khan later received direct confirmation from the ILSC that this was not in fact the case and the document was a forgery.<sup>16</sup>

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<sup>15</sup> *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 (HL) at 169–170.

<sup>16</sup> See email from Justice Paul Madigan, sent to Dr Sahu Khan on 15 February 2015.

[47] On the basis of the evidence before me, I am not prepared to draw an inference of dishonesty in respect of the representations set out at [37] above, even if each of them was false at the time it was made (which is also not clear). The representations certainly give rise to suspicion and concern. Looking at them as a whole, they seem implausible. But in terms of the proven facts from which to infer falsity and dishonesty, there are only those two matters set out at [46] above.

[48] On the (limited) evidence before me, I cannot rule out that the representations were true at the time they were made, or even if not, that Mr Shariff himself was being misled as to the correct position, or was being told the correct position but that position kept changing. I also have no evidence or knowledge of practices in Fiji that might reflect on the inherent implausibility (or otherwise) of some of the representations, such as the potential for the Appointment to have been made in the first place (and at the level of salary indicated); insurance cover requirements in Fiji; any system of contract registration that might be relevant; Mr Shariff's own knowledge of the circumstances surrounding the Independent Legal Services Commission issue (for example, whether he himself had been supplied with a forged document); taxation matters that are referenced in the emails and so on.

[49] Ultimately, given the limited and incomplete evidence before me, I am not satisfied that there is clear and cogent evidence from which I can make a finding of dishonesty on Mr Shariff's part at the time each representation was made.

### **Claims for “special damages”**

[50] For completeness, I note that Dr Sahu Khan's claims for “special damages” would not be recoverable pursuant to a tort claim such as this, as Dr Sahu Khan has not actually suffered any reliance loss to that extent as a result of the representations made.<sup>17</sup>

[51] In theory, it may be possible to claim such amounts by way of a contractual claim (as expectation damages). But I envisage several problems with such a claim. The first and most obvious is that Dr Sahu Khan has not pleaded his claim as breach

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<sup>17</sup> *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL) at 39; *Attorney-General v Geothermal Produce NZ Ltd* [1987] 2 NZLR 348 (CA) at 359.

of contract. Further, there would be issues as to what is the actual contract alleged; and importantly, its terms (for example, whether it was a term of any alleged contract that the Appointment would be made). Finally, serious consideration would need to be given to whether any *prima facie* contractual obligation to pay the “special damages” was unenforceable by reason of the contractual penalties doctrine.<sup>18</sup>

### **Claim for “other payments”**

[52] Dr Sahu Khan also claims against Mr Shariff in respect of some otherwise unrelated financial dealings. In setting out the background facts, the amended statement of claim says that in 2010 and 2011, Dr Sahu Khan’s family company (Zarbinsha Company Limited, of Fiji) advanced money to Mr Shariff on the security of a mortgage over some land owned by Mr Shariff, in Lautoka, Fiji.

[53] Paragraph 22 of the amended statement of claim later sets out as follows:

1. The Plaintiff in 2012 on behalf of his family company [Zarbinsha Company Limited] had instructed the solicitors in Fiji namely Iqbal Khan and Associates of Lautoka, Fiji to register a mortgage on the property of Mohammed Aleem Khan CT.12555 situated in Nadi, Fiji (“The Said”)
  - i. The Plaintiff had paid all the stamp duties and registration fees to the said solicitors but the said mortgage was not registered.
  - ii. Then later in 2012 the Defendant undertook to have the said Mortgage registered and advised the Plaintiff to again pay the stamp Duties and registration fees and late penalties and undertook to have the Mortgage registered through the Solicitors.
  - iii. The Plaintiff paid the Defendant on 29 October 2012 the sum of \$16,020.00 but the mortgage was not registered.
  - iv. Accordingly, the Plaintiff further claims the said sum \$16,020 from the Defendant.

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<sup>18</sup> *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 (HL); *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 (CA) at [60]–[61]. See also *Paciocco v ANZ Banking Group Ltd* [2012] HCA 30, (2012) 247 CLR 205; *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67, [2016] AC 1172.

- |    |   |                      |
|----|---|----------------------|
| 2. | Further payments were made by the Plaintiff to the Defendant 2011 |                      |
|    | i.  | 26 Feb \$4,000.00    |
|    | ii.   | 16 March \$10,000.00 |
| 3. | Total under 1 and 2 above   | <u>\$30,020.00</u>   |

[54] I am not satisfied that this claim can succeed. Aside from identifying no cause of action in respect of these payments, Dr Sahu Khan has provided no evidence that the payments ever actually occurred, or that Mr Shariff gave the specified undertaking. Further, a mortgage deed annexed to Dr Sahu Khan's affidavit, presumably in support of this claim, appears to be for a property other than the one pleaded, it having a different a certificate-of-title number. That mortgage deed is also affixed with seals indicating that it was registered in 2010 and that stamp duty was paid.

[55] I also observe that the pleaded facts raise a question of whether the proper claimant for these sums would be Zarbinsha Company Limited, rather than Dr Sahu Khan himself.

### **Conclusion**

[56] For all of these reasons, I decline to grant the relief sought in the amended statement of claim

[57] Given the above, the questions of costs and interest do not arise.

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Fitzgerald J

## SCHEDULE

PLEADED CLAIM			EVIDENCE OF REPRESENTATION		EVIDENCE OF RELIANCE/LOSS	
ASOC para	Amount claimed (FJD)	Particulars of claim	Date of Dr 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	
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.	
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	\$8,868 in tax on remittance of \$1.5 million	23 January 2015	\$8,868.00
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	