IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

Civil Appeal No. ABU 0041 of 2005
(High Court Civil Action No. HBC 438 of 2003L)

BETWEEN:

NATIVE LAND TRUST BOARD

Appellant

AND

RAPCHAND HOLDINGS LIMITED

Respondent

Coram:	**Eichelbaum, JA**
	Penlington, JA
	Scott, JA
Date of Hearing:	**Wednesday 8 November 2006**
Counsel:	**K. Vuataki for the Appellant**
	H.K. Nagin for the Respondent
Date of Judgment:	**Friday 10 November 2006**

JUDGMENT OF THE COURT

---

[1] On 13 May 2005 the High Court at Lautoka, after assessing the Respondent's claim, awarded $1,643,190.50 damages resulting from the Appellant's repossession of native land, namely native lease 25050 known as NL Legalega at Nadi.

[2] Although the notice and grounds of appeal are perhaps slightly loosely drafted, it is not disputed that the Respondent appeals:

(i) against the Court's refusal, on 22 April 2005, to set aside an interlocutory decision dated 25 February 2005 which had the effect of preventing the Appellant from contesting liability;

(ii) against the Court's decision on 22 April refusing the Appellant's request to postpone the hearing of the assessment of damages following the refusal of the Appellant's first application (i) above;

(iii) against the Court's decision to allow the Respondent at the assessment hearing to rely on an accountant's report "Financial Projection and Valuation of Business Opportunity" dated 20 February, 2005; and

(iv) against the amount of damages awarded by the Court.

[3] The Respondent issued its writ on 8 December 2003. It sought a declaration that the re-entry was unlawful, an injunction restraining the Appellant from further interfering with the Respondent's right to possession, special damages quantified at $137,095.50, representing what was said to have been spent by the Respondent on acquiring and upgrading the property and general damages, including punitive and exemplary damages, quantified at $8,000,000.

[4] On 10 May 2004 Judgment in Default of Defence with damages to be assessed was entered by the Respondent pursuant to RHC 0.19 r 3.

[5] On 10 August 2004 the Appellant filed an application to have the judgment entered set aside. On 6 September 2004 this application was granted by consent. Unfortunately, we were not supplied with a copy of the order made on that day. It appears however from a chronology of events helpfully included in the ruling delivered by the Court on 22 April 2005 (paragraph [2] (ii) above) that the order was made subject to: "Directions ordered in costs".

[6] On 9 September a Statement of Defence was filed. The Defence, which was fully particularized, admitted that the Appellant had re-entered the land leased to the Respondent but contended that it was entitled to do so since the Respondent had not only failed to comply with a central requirement of the lease that it develop the land but also, by offering the land for sale to a third party, had made it plain that it did not intend to proceed with the development and comply further with the terms of the lease.

[7] On 25 October the Respondent filed a summons for directions pursuant to RHC O 25. On 3 November 2004, the usual orders were made, including an order that the Appellant supply the Respondent with a list of its documents within 14 days. That order was not complied with.

[8] On 29 November 2004 the Respondent filed an application, purportedly pursuant to Order 24 seeking to have the judgment

in default of defence granted on 10 May 2004 re-instated on the ground of non compliance with the directions given by the Registrar on 3 November. In the supporting affidavit filed on 29 November, failure to comply with the orders is averred however no details of the non compliance are supplied. The deponent stated that he was:

> "very frustrated by the delay tactics of the Defendant, as it seems there has been no progress in this matter, as we work very hard to set a hearing date in this matter."

The affidavit was not answered by the Appellant.

[9] On 25 February 2005, after several adjournments, some of which were apparently occasioned by the Appellant's lack of preparedness, the court, after hearing counsel for both parties, granted the Respondent's application and struck out the defence with costs. The Order of the Court, as sealed and signed was somewhat unusual. Paragraph 1 read:

> "It is ordered that the delay tactics of the Defendant has been the cause of no progress in this matter".

[10] On 10 March 2005 a Notice of Assessment of damages was filed returnable on 18 March. On 18 March the Appellant appeared without proper instructions and obtained an adjournment to 22 April.

[11] On 21 April 2005 the Appellant filed an ex parte application returnable on 22 April seeking to have the order of 25 February "revoked" or set aside.

[12] On 22 April the Court dismissed the 21 April application. The judge observed that:

> "Litigants are not entitled to the uncontrolled use of the judge's time".

He went on:

> "Whilst I have said it on several occasions in the past it seems to bear no fruit in this court that the Native Land Trust Board is in no different position to any other litigant. It is obliged to comply with the directions of the court, the timetable set by the court and to appropriately use the court's time."

[13] After dismissing the ex parte application the Court proceeded to hear the assessment of damages.

[14] The Respondent called three witnesses. One of them produced the accountant's report previously referred to. The principal conclusion of the report was that the Respondent, as a result of the Appellant's action, had lost a business opportunity valued at $1,300,000 and that the Respondent had also incurred substantial additional costs.

[15] In his judgment delivered on 13 May the judge, after dealing with the background to the case, began by saying:

> "the history of this matter is indeed regrettable and the behaviour of this [Appellant] has been most unhelpful to the court. On the hearing of the matter

the [Appellant] placed no evidence before the Court and made no submission."

The court accepted the Respondent's evidence, including, principally the accountant's report and gave judgment amounting in all to $1,643,190.50 plus costs, summarily assessed at $3000.

[16] Both counsel filed helpful written submissions. Mr. Vuataki conceded that the Appellant's handling of the litigation fell far short of what was acceptable. He did not deny that orders of the High Court had not been complied with and that as a result numerous delays had been occasioned. However, he rejected the assertion that the Appellant's conduct had been contumacious. In particular, while it was accepted that there had been a failure to comply with the order for discovery, the non compliance was not a deliberate attempt to suppress documents. The main reason, Mr. Vuataki explained, for the Appellant's failure to comply with the orders and rules of the court was the overall weakness of the Appellant's legal department. As previously had been explained by Mr. Qoro to the judge, the fact was that several legal officers had resigned from the Appellant's legal department and the remaining staff who were based in Suva had simply been unable adequately to manage the files re-allocated to them.

[17] Mr. Vuataki submitted that on 25 February the only question before the court was whether the failure by the Appellant to make discovery as ordered (and, possibly, the failure to attend a pre-trial conference) justified striking out the defence. While it

was not doubted that the Court had power to act as it did, Mr. Vuataki suggested that in the absence of anything to suggest deliberate disobedience or to suggest that a fair trial could no longer be held, the order should not have been made. As an alternative, he suggested that the Court should have considered making an "unless order" (and see also Samuels v. Linzi Dresses Ltd [1981] QB 115; [1980] 1 All ER 803).

[18] The Respondent's written submissions which were prepared by Mr. Koya were adopted by Mr. Nagin. Mr. Nagin focussed on the extraordinarily unsatisfactory manner in which the Appellant had conducted the litigation. The events surrounding the order made on 25 February provided a perfect example: the Notice of Motion for the order made on 25 February was originally returnable on 3 December. The hearing of the application was adjourned to 11 February 2005. On that date the Appellant's counsel appeared without instructions. He asked for seven days adjournment but was in fact granted 14 days to 25 February. On 25 February counsel told the court that he had still not received the file from Suva and therefore was still without instructions. He sought another adjournment which this time was refused. In the face of such a lack of co-operation by the Appellant Mr. Nagin submitted that there really was no alternative to the course taken by the court.

[19] In Mr. Koya's written submissions another case involving the same Appellant is referred to (NLTB v. Kuar ABU 38/97 – [1997] FJCA 44). The court said:

> "the history of the present litigation is a saga of inordinate delays, inexcusable defaults, gross negligence and blatant disregard of the rules on the part of the [Native Land Trust Board]."

From what we were told, there is very little to suggest that the Appellant's legal department has improved its performance since that judgment was delivered.

[20] We have anxiously considered the submissions most ably presented to us. We understand the frustration of the Respondent, keen to have its claim resolved as soon as possible. We sympathise with the position of the judge whose conscientious commitment efficiently to manage the case load of his court was repeatedly thwarted by wholly unacceptable conduct by the Appellant. At the same time however we have to ask ourselves whether, in the face of what was clearly a very substantial monetary claim it was right, on 25 February, absolutely to debar the Appellant from defending.

[21] Unfortunately, when he made the 25 February order, no ruling was given by the judge. In Bhawis Pratap v. Christian Mission Fellowship (ABU 93/05) we referred to a number of authorities illustrative of the principle that to deprive a defendant of the right to defend is a serious step, only to be taken in the clearest cases. We also referred to the importance of giving sufficiently adequate reasons for decisions, especially decisions of a final nature.

[22] In the present case, the judgment in default of defence which was entered on 10 May 2004 was, as has been seen, set aside

by consent on 6 September 2004. In our view, therefore, any non compliance with the rules or orders of the court which had occurred before 6 September 2004 had been waived. They could not provide grounds supportive of a subsequent application to re-instate the 10 May order. Looked at in this way, the question before the judge on 25 February was not whether there had been misconduct by the Appellant prior to the registrar's order made on 3 November 2004 but whether the Appellant's conduct subsequent to that date was sufficiently unsatisfactory to warrant the Appellant being deprived of its right to defend.

[23] The affidavit filed in support of the Respondent's 29 November 2004 application to re-instate the default judgment complained that the Appellant had failed to file its list and affidavit of documents. According to the Registrar's order these should have been filed on or about 17 November. It also appears probable that the Appellant had not attended a pre-trial conference fixed for 26 November. The default in compliance with the first order amounted to just twelve days while the application to debar the Appellant from defending was made three days after its failure to attend the pre-trial conference. Against the whole background of default by the Appellant these further failures were certainly vexing but, we do not think, sufficiently serious to warrant the order striking out the defence.

[24] As has already been noted, in paragraph (4) of the affidavit supporting the Respondent's 29 November application, the Respondent referred to the "delaying tactics" of the Appellant. In the absence of reasons for his decision, the first paragraph of the order made on 25 February, also already referred to,

appears to us to suggest that the judge accepted that "delay tactics" in other words contumacious conduct by the Appellant, had been proved. Had it indeed been proved, then undoubtedly the Appellant's claim to have been unfairly treated would have been considerably weakened (see Grovit & Ors v. Doctor [1997] 2 All ER 417). Without, however, any examination and finding of fact relating to the Respondent's claim we do not think that the conclusion that the Appellant had deliberately resorted to disobedience and delaying tactics was safely arrived at.

[25] In our view, on 25 February 2005 the Court should have made an "unless" or other suitable peremptory order (almost certainly coupled with an order mulcting the Appellant in costs) the breach of which would afford the Appellant no arguable grounds for complaint. For the reasons we have given, however, we take the view that an order, having the effect of striking out the defence, should not have been made.

[26] Having reached the conclusion that the order made on 25 February 2005 should be set aside, the remaining grounds of appeal do not call for consideration.

[27] The appeal is allowed. In view of the manner in which the Appellant has conducted the proceedings in the High Court we think it proper to award the Respondent its costs of this appeal.

RESULT

1. Appeal allowed.
2. Order of the High Court dated 25 February 2005 set aside.

3. Action remitted to the High Court and referred to the Master for directions to ensure a speedy trial

4. Respondent's costs summarily assessed at $1,000.

Eichelbaum J.A.

Penlington J.A.

Scott J.A.

Solicitors:

Vuataki Qoro, Lautoka, for the Appellant

SHERANI & Co, Suva for the Respondent