IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL ACTION HBC 18 of 2012

BETWEEN : SEVERO VUTI, VATERESIO LEKE TUIQEREQERE, DANIELE BOKINI suing on their own behalf and on behalf of other members of the Mataqali Natia (Cobe) tokatoka Qalilevu whose names and addresses are attached hereto as schedule 1

PLAINTIFFS

AND : iTAUKEI LAND TRUST BOARD a body corporate incorporated under the Native Land Trust Act Cap 134 of Victoria Parade, Suva.

DEFENDANT

EXTEMPORE RULING

INTRODUCTION

[1]. The plaintiff are aggrieved about actions taken by *i*TLTB which led to the de-reservation of their customary land and to the subsequent issue of various leases around that land. They alleged that these actions were taken due to the negligence breach of trust, and breach of statutory duty on the part of the *i*TLTB. The plaintiffs also plead promissory estoppel.

[2]. The court file reveals that iTLTB had persistently failed to file a supplementary list of documents. The plaintiffs tried over a period of a year or so between October 2012 to August 2013 to arrange for inspection of iTLTB documents, but to no avail.

[3]. In December 2013, the Master struck out the defendant's statement of defence on account of its failure to comply with pre-trial discovery and inspection orders. But the striking out was only made after a failure of the defendant to comply with an unless order.

[4]. Before me now, the NLTB seeks an order to set aside the order that struck out its defence. The plaintiffs on the other hand, are pressing to have a formal proof date set.

COMMENTS

[5]. Order 24 Rule 16(1)(b) gives power to the Master to dismiss a statement of claim, or, strike out a defence, if the plaintiff or defendant fails to comply with any pre-trial discovery order. But was that power exercised properly in this case? This is what the defendant appears to be arguing before me in seeking an Order of this court to set aside the order of the Master which struck out its defence. The plaintiff, on the other hand, wants to press on and seeks a date to formally prove his case before this court.

[6]. Notably, the last Order of the Master which the defendant failed to comply with and which preceded the striking out of the defence was an unless-order.

[7]. The Order 24 discovery process is central to the system of fact finding and decision making in modern civil litigation[1] which encourages parties to discover, and to make available for inspection, all relevant documents, regardless of whether the document(s) support(s) their case or the other party's case. In **Davies v Eli Lilly & Co** [1987] 1 WLR 428, Sir John Donaldson MR explains the "justice" behind this approach:

> *In plain language, litigation in this country is conducted "cards face up on the table". Some people from other lands regard this as incomprehensible. "Why", they ask, "should I be expected to provide my opponent with the means of defeating me?'. The answer of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information,, it cannot achieve this object.*

[8]. C Cameron & J Liberman, **'Destruction of Documents Before Proceedings Commence—What is a Court to Do?'** (2003) 27 *Melbourne University Law Review* 273, 274 explain the same policy thus:

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[1] See Australian Law Reform Commission Report on Discovery in Federal Courts (ALRC CP 2) Published on 15 November 2010. Consultation Paper was released on 15 November 2010.

The primary aim of discovery is to ensure that litigants disclose to each other all relevant, non-privileged documents, whether that disclosure helps or hurts their respective cases, so that they will know the case they have to meet and judges will have the evidence they need to do their job effectively

[9]. E Bray, **The Principles and Practice of Discovery** (1885), 1 explained the purpose of discovery thus:

to ascertain facts material to the merits of his case, either because he could not prove them, or in aid of proof and to avoid expense; to deliver him from the necessity of procuring evidence; to supply evidence or to prevent expense and delay in procuring it; to save expense and trouble; to prevent a long enquiry and to determine the action as expeditiously as possible; whether he could prove them aliunde or not; to facilitate proof or save expense

[10]. With all the above as the policy backdrop, it is all the more clearer why the law should treat a litigant's failure to comply with discovery and inspection orders with such seriousness. Small wonder then why Fiji's High Court Rules 1988 would give the High Court power to impose rather drastic sanctions against a recalcitrant party, in any appropriate given case. I say this again, the court has power to dismiss a claim or strike out a defence if the plaintiff or defendant fails to comply with discovery orders. And then there is Order 24 Rule 16(2), which provides that a non-compliant party shall also be liable to committal.

[11]. But having said all that, a defendant's right to defend his case is equally important and one not to be quickly or lightly written-off in any given case. In this regard, the Fiji Court of Appeal cautions that the power to strike out a defence for want of compliance with discovery orders, should only be exercised in the clearest of cases (see **Bhawis Pratap v. Christian Mission Fellowship** (ABU0093.2005); **Native Land Trust Board v Rapchand Holdings Ltd** [2006] FJCA 61; ABU0041J.2005 (10 November 2006).

[12]. The question I ask is: considering that the iTLTB is, a body corporate created by the iTaukei Lands Trust Act, and is a trustee of all itaukei lands, and considering the nature of the allegations and claim against it, is there any special reason why it be

should be allowed to defend the case against it – notwithstanding its contumelious conduct in disobeying an unless order in this case?

THE LAW

[13]. To reiterate, the FCA in **Bhawis Pratap v. Christian Mission Fellowship** (ABU0093.2005), had cautioned that *"to deprive a defendant of the right to defend is a serious step, only to be taken in the clearest cases"*. As to what cases fall into that category of "clearest of cases", the FCA in **Native Land Trust Board v Rapchand Holdings Ltd** [2006] FJCA 61; ABU0041J.2005 (10 November 2006) is insightful.

[14]. In **Rapchand**, the NLTB had failed persistently to comply with certain production and inspection orders. Accordingly, the High Court struck out NLTB's defence. The orders in question were non-peremptory orders. Shortly thereafter, NLTB applied to set aside the order which had struck out its defence. However, the High Court dismissed its application, the reason, it must be noted, being that NLTB was laxing even in pursuing that application. The High Court then proceeded to assess damages. NLTB however appealed to the FCA.

[15]. Before the FCA, NLTB explained its failure to comply and argued that:

(i) it's conduct was not contumacious as it had not withheld the documents deliberately[2]- and,

(ii) the power to strike out a defence is exercisable only if there was evidence that it deliberately disobeyed discovery orders, or, if a fair trial would not be possible[3].

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[2] The relevant extract from the Fiji Court of Appeal Ruling:

[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.

[3] The relevant extract from the FCA ruling:

[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).

FCA's Reasoning in Rapchand

[16]. The FCA sympathized with the plaintiff's interest in having his claim resolved quickly as well as the (High) Court case- management obligations. It was also critical of the delaying tactics of the NLTB throughout the case. However, the FCA took into account that there was a very substantial monetary claim against the NLTB. It also observed that the High Court had given no written ruling (let alone any written reasons) to explain why it had struck out the defence. Having observed all this, the FCA then warned, as it had done in **Bhawis Pratap v. Christian Mission Fellowship** (ABU0093.2005), that, *"to deprive a defendant of the right to defend is a serious step to be taken only in the clearest of cases"*[4].

[17]. In the course of its reasoning, the FCA accepted the argument that what the High Court judge should have asked himself before striking out the defence was, whether NLTB's conduct "was sufficiently unsatisfactory to warrant it being denied its right to defend itself"[5]. Then, a further review of the case, the FCA took the view that NLTB's failures in that case were not *"sufficiently serious to warrant the order striking out the defence"*.

Why NLTB Conduct In Rapchand "Not Sufficiently Serious To Warrant Striking Out of Its Defence?

[18]. The FCA took the following into account:

(i) NLTB's default amounted to just twelve days and three days respectively in relation to the filing of list of documents and pre-trial conference. These were not *"sufficiently serious to warrant the order striking out the defence"*[6].

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[4] The FCA said:

[20] ....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 (ABU0093.2005) 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.

[5] The FCA said:

[22] ..... the question before the judge on 25 February was .... whether the Appellant's conduct subsequent to that date was sufficiently unsatisfactory to warrant the Appellant being deprived of its right to defend.

[6] This is what the FCA said:

(ii) what is required is actual evidence of contumacious conduct or deliberate disobedience of the discovery orders on the part of NLTB. The court should actually have examined the evidence and make a finding of fact of contumacious conduct and/or deliberate disobedience of court orders[7]. Such evidence would have been sufficient to warrant the striking out of its defence.

(iii) delay per se does not necessarily amount to contumacious conduct (see footnote 7).

(iv) but disobedience of an unless order or a peremptory order is sufficient to constitute contumacious conduct[8].

ANALYSIS

[19]. One might construe the FCA's reasoning in **Rapchand** rather narrowly as authority that a Court may strike out a defence on account of a defendant's failure to comply with a non-peremptory order, if there is evidence of contumacious conduct and/or deliberate disobedience of the non-peremptory orders.

[20]. The onus to establish these lies with the plaintiff who is seeking to strike out the defence. But where the defendant disobeys a peremptory order or an unless order, that in itself is sufficient evidence of contumacious conduct, enough to justify striking the defence out.

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[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.

[7] The Court said:

[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.

[8] The FCA said:

[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.

[21]. Such a construction of **Rapchand** would appear to be consistent with Auld LJ's oft cited sentiments in **Hytec Information Systems Ltd v Coventry City Council** [1997] 1 W.L.R. 1666 at 1676, CA:

> "is by its nature intended to mark the end of the line for a party who has failed to comply with it and any previous orders of the court"

[22]. The English Court of Appeal would further propagate the same view as follows in **Star News Shops v Stafford Refrigeration Ltd** [1998] 4 All E.R. 408 at 415; [1998] 1 W.L.R. 536 at 545, CA:

> I am reinforced in this conclusion by considering the approach of the court in cases of failure by a party to comply with the terms of an 'unless' order. In **Caribbean General Insurance Ltd v Frizzell Insurance Brokers Ltd** [1974] 2 Lloyd's Rep 32 the Master made an unless order against the plaintiffs in respect of specific discovery and allowed 28 days for compliance. Thereafter two judges granted final extensions. The defendants entered judgment in default of compliance with the unless order. At trial the plaintiffs applied to set aside the default judgment. The trial judge set aside the judgment and extended the time for compliance with the original unless order. The Court of Appeal held that the judge was wrong to do so in the exercise of his discretion, failed to ask himself the right question and erred in law. Peremptory orders were made to be obeyed. Final, peremptory or 'unless' orders were only made by a court when the party in default had already failed to comply with the requirement of the rules or an order, the court was satisfied that the time already allowed had been sufficient and the failure of the party to comply with the orders was inexcusable. .....
>
> .....It cannot be said that the fourth party by its behavior had reached the end of the line merely because it had failed to comply with one previous order of the court which in itself was not even a final or an 'unless' order.
>
> Accordingly, I have come to the conclusion that although the terms of Ord 24, r 16(1) gave the judge jurisdiction to make the order that he did, he none the less erred in principle in striking out a defence for breach of a non-peremptory order, that he should have made a final or 'unless' order and that he was plainly wrong in the exercise of his discretion in making such an order.
>
> The only question which remains is whether the judge was under an obligation to make an unless order in the absence of a specific application to do so supported by an affidavit. In my judgment the judge had an inherent power to do so of his own initiative and the absence of an application and affidavit did not preclude him from doing so. He could have proceeded on the basis of what counsel told him on her express instructions. In reaching this conclusion I take into account the dictum of Bingham MR in **Costellow v Somerset CC** [1993] 1 All ER 952 at 959-960, [1993] 1 WLR 256 at 264. Bingham MR, having considered the position where a defendant sought dismissal of the action for want of prosecution and a cross-summons for an extension of time, said:
>
> *'In the great mass of cases, it is appropriate for the court to hear both summonses together, since, in considering what justice requires, the court is concerned to do justice to both parties ... and the case is best viewed in the round ... It is in my view of little or no significance whether*

the plaintiff makes such an application or not: if he does not, the court considering the defendant's application to dismiss will inevitably consider the plaintiff's position and, if the court refuses to dismiss, it has power to grant the plaintiff any necessary extension whether separate application is made or not ... Save in special cases or exceptional circumstance, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs'.

Caution

[23]. I take heed of the timely warning of the Singaporean Court of Appeal in **Mitora Pte Ltd v Argritrade International (Pte) Ltd** [2013] 3 SLR 1179 that the routine use of unless orders would be the forensic equivalent of using a sledgehammer to crack a walnut[9]. This is what Mr. Nayare appears to be arguing, is the case here. Is there room for such a view in Fiji? Is it still open to this court to embark on a balancing exercise between the iTLTB's conduct, however contumacious and contumelious it was, against the (arguable) graver injustice of a trial not on the merits - particularly where (arguably) there is no clear evidence that the plaintiff will suffer grave injustice otherwise if the iTLTB were to be allowed to defend its case?.

[24]. In **Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani** [1999] 1 SLR (R) 361., the Singaporean Court of Appeal opined that, when dealing with the consequences of non-compliance of an unless order, the Court is not concerned with why the unless order was made, but rather, why it was not complied with.

[25]. Tan Boon Heng, **Case Note - Mitora: The Mantra of " Unless Orders"?** (2014) 26 SAcLJ at page 295 cites caselaw in Singapore which endorse the view that the enforcement of an unless order would be harsh and unjust where the consequences or the penalty for non-compliance is grossly disproportionate to the default in question.

> *The decision in **Teeni Enterprise** had created a renewed awareness that the courts must balance the importance of compliance with Court Orders with the need to ensure that a party would not be summarily deprived of its legal rights without any hearing of the merits especially when the non-compliance or breach was not so serious or aggravating as to warrant such a serious consequence. The Court in Teeni Enterprise agreed with the party who breached the unless order that it was a draconian punishment to allow the*

[9] See also Tan Boon Heng, Case Note - Mitora: The Mantra of " Unless Orders"? (2014) 26 SAcLJ at page 295 (http://www.sal.org.sg/digitallibrary/Lists/SAL%20Journal/Attachments/674/(2014)%2026%20SAcLJ%20295-308%20(Mitora%20v%20Agritrade).pdf)

massive counterclaim of over $1.2 million and that the dismissal of the whole of the plaintiff's claim was disproportionate, taking into account the relatively trivial breach by the plaintiff which did not occasion any real prejudice to the defendant.

[26]. The English Court of Appeal shares the same view in **Marcan Shipping (London) Ltd v Kefalas** [2007] 1 WLR 1864 where, at [36] Moore-Bick LJ said:

> [B]efore making conditional orders, particularly orders for the striking out of statements of case or the dismissal of claims or counterclaims, the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case. Of course, it is impossible to foresee the nature and effect of every possible breach and the party in default can always apply for relief, but a conditional order striking out a statement of case or dismissing the claim or counterclaim is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified. I find it difficult to imagine circumstances in which such an order could properly be made for what were described in *Keen Phillips v Field* as "good housekeeping purposes".

[27]. Browne-Wilkinson VC in **In re Jokai Tea Holdings** [1992] 1 WLR 1196 at 1203B said:

> In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an "unless" order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

Parker LJ opined at 1206 that:

> I have used the expression "so heinous" because it appears to me that there must be degrees of appropriate consequences even where the conduct of someone who has failed to comply with a penal order can properly be described as contumacious or contumelious or in deliberate disregard of the order, just as there are degrees of appropriate punishments for contempt of court by breach of an undertaking or injunction. Albeit deliberate, one deliberate breach may in the circumstances warrant no more than a fine, whilst another may in the circumstances warrant imprisonment.

Guidelines for the Use Of Unless Orders?

[28]. In Singapore, as Heng observes, the Court of Appeal in **Mitora Pte Ltd** has gone on to develop the following guidelines on the use of unless orders.

> *With all of the foregoing points in mind, we would suggest the following guidelines for the more scrupulous use of "unless orders":*
>
> *(a) unless orders" stipulating the consequence of dismissal should not be given as a matter of course but as a last resort when the defaulter's conduct is inexcusable;*

(b) the conditions appended to 'unless orders' should as far as possible be tailored to the prejudice which would be suffered should there be non-compliance; and

(c) other means of penalising contumelious or persistent breaches are available, including but not limited to

(i) awarding costs on an indemnity basis;

*(ii) ordering the payment of the plaintiff's claim or part thereof into court where the defaulting party is a defendant (see **Husband's of Marchwood Ltd v Drummond Walker Developments Ltd** [1975] 1 WLR 603 at 605);*

(iii) striking out relevant portions of the defaulting party's Statement of Claim or Defence rather than the whole;

(iv) barring the defaulting party from adducing certain classes of evidence or calling related witnesses; and

(v) raising adverse inferences against the defaulting party at trial.

In this regard, the draconian sanction of striking out a litigant's claim or defence in its entirety should not be the default consequence of an "unless order" as it would effectively deprive the litigant of its substantive rights on account of a procedural fault.

[29]. I believe Fiji can adopt the same judicial policy considering the wide powers given to the court under Order 24 Rule 16(1)(b) *"to make such order as it thinks just"* including dismissing an action or striking out a defence and entering judgement.

16.-(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1),-

(a) that party shall not be entitled subsequently to produce a document in respect of which default was made without the leave of the Court, and

*(b) **the Court may make such order as it thinks just including**, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.*

(2) If any party against whom an order for discovery or production of documents is made fails to comply with it, then, without prejudice to paragraph (1), he shall be liable to committal.

CONCLUSION

[30]. In this case, while Mr. Nayare's legal argument may raise a valid point regarding the reviewability of an order to strike out a pleading on account of non-compliance with an unless order, I see nothing on the facts to convince me that I should review and set aside the Master's Order in this case. My reasons I will detail later.

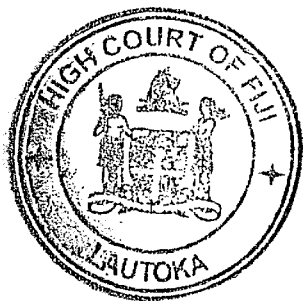
ORDERS

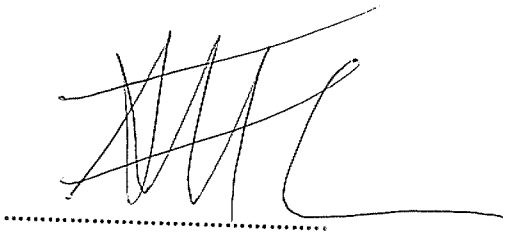
(i) iTLTB's application is dismissed.

(ii) costs to the plaintiff which I summarily assess at $3,000

(iii) a formal proof date to be set for the plaintiff's case

I would recommend to the Chief Justice a judicial policy along the same lines as formulated by the Singaporean Court of Appeal in **Mitora Pte Ltd v Argritrade International (Pte) Ltd** [2013] 3 SLR 1179.





Anare Tuilevuka
JUDGE
Lautoka

30 April 2015