

In the High Court of Fiji  
At Labasa  
Civil Jurisdiction

Civil Action No. HBC 51 of 2018  
Toyota Tsusho (South Sea) Limited  
Plaintiff  
v  
Goundar Shipping Limited  
Defendant

Counsel: The plaintiff was absent and unrepresented  
Mr Nandan for the defendant.  
Date of hearing: 18<sup>th</sup> September, 2019  
Date of Ruling: 21<sup>st</sup> November, 2019

**Ruling**

1. The defendant, in its summons filed on 13<sup>th</sup> August 2019, seeks extension of time to apply for leave to appeal a decision of the Master striking out the statement of defence, since the defendant failed to appear on 31 May, 2019, refusing to give audience to the defendant's counsel on 17 and 23 July, 2019, and stay of proceedings until determination of this application and further orders of Court. The application is made under Or 3,r 4.
2. *Chronology of relevant Orders made by the Master*
  - (i) On 12<sup>th</sup> April, 2019 The plaintiff and defendant were represented. The Master made an unless Order that unless the Defendant files its Affidavit verifying its List of Documents, (AVLD) by 18<sup>th</sup> April, 2019, the court will deem that they have no documents to file and rely upon.
  - (ii) On 24<sup>th</sup> April, 2019 The defendant was not present nor represented. The parties were directed to convene a PTC and file minutes before 8<sup>th</sup> May, 2019.
  - (iii) On 9<sup>th</sup> May, 2019 The defendant was not present nor represented. The plaintiff's solicitor informed the Master that draft PTC minutes were sent on 6<sup>th</sup> May, 2019 and have yet to receive a reply from defendant's counsel. A final adjournment was given for parties to convene PTC and file minutes on or before 17<sup>th</sup> May, 2019.

- (iv) On 27 May, 2019 The defendant was not present nor represented and a final adjournment was given for the PTC minutes to be filed on or before 31<sup>st</sup> May, 2019. The Master made Order that: “*Unless Counsel for the Defendant appears for PTC before (her) on 31<sup>st</sup> May, 2019 @10.30 am, the Defence shall be struck out with costs.*”
- (v) On 31<sup>st</sup> May, 2019 The Master noted that counsel for the Defendant failed to appear and the PTC minutes were not filed. She made Order that the unless order of 27/05/19 is effective immediately and struck out the statement of defence.

3. The notice and proposed grounds of appeal seek that the following orders made by the Master of the High Court, on 27<sup>th</sup> May, 2019, 31 May, 2019, 17 July, 2019, and 23 July 2019, be set aside:

1. *Unless the Defendant appeared before the Honourable Master on the 31 day of May 2019, the Statement of Defence shall be struck out (Unless Orders)*
2. *The Statement of Defence is struck out on the 31 day of May 2019 (Striking Out Orders)*
3. *Refused to give audience to the counsel of the Defendant on the 17 July 2019 and on the 23 July 2019.*  
*On the following grounds*
  1. *The Honourable Master erred in law and fact and/or misdirected herself in law and fact in dismissing and/or misdirected herself in law and in fact in making the Unless Order in absence of the Defendant and/or the Defendant’s Counsel;*
  2. *The Honourable Master erred in law and in fact and/or misdirected herself in making the Striking Out Order without first sending a Notice of Adjourned Hearing to the Defendant or its counsel and without enquiring whether the Defendant was aware of the Unless Orders.*
  3. *The Honourable Master erred in law and in fact and/or misdirected herself in refusing to grant audience to the Defendant’s counsel on the 17 July 2019 and the 23 July 2019.*

4. The principles upon which an enlargement of time may be granted was stated by Calanchini P in *Dawai v Native Lands and Fisheries Commission*, [2019] FJCA 76; ABU43.2018 (24 May 2019) as follows:

*The court will consider (a) the length of the delay, (b) the reason for non-compliance, (c) whether there is a ground of merit justifying the appellate court’s consideration or, where there has been substantial delay, nonetheless is there a ground that will probably succeed and (d) if time is enlarged, will the respondent be unfairly prejudiced: NLTB (now TLTB) – v- Khan and Another [2013] FJSC 1; CBV 2 of 2013, 15 March 2013.*

5. In *Kumar v State; Sinu v State*, [2012] FJSC 17; CAV0001.2009 (21 August 2012) Gates CJ cited the following passages:

In *Rhodes* 5 Cr. App.R 35 at 36 it was said:  
*A short delay may be disregarded by the Court if it thinks fit, but where a substantial interval of time a month or more elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons.*

...in *The Queen v Brown* (1963) SASR 190 at 191 at p.191:

*..where the delay was about two months, the rule laid down is that, where the delay is substantial, extension will not be granted unless the Court is satisfied that there are such merits that the appeal will probably succeed,"*(footnotes omitted)

6. Vandhana Kirti, solicitor of Reddy & Nandan in her affidavit in support states that the defendant did not appear on 24<sup>th</sup> April, 2019, as their litigation clerk failed to update their diary after the earlier calling date. The defendant was unable to file its AVLD, as its Director was abroad. They *"were not advised by (their) city agents that unless orders had been made"*. They were unable to proceed with the PTC, as their AVLD was not filed. Their city agents received a NOAH that the matter was to be called on 17 July, 2019, but were refused an audience by the Master. On 18<sup>th</sup> July, 2019, their city agents informed them that the matter was struck out. Finally, Vandhana Kirti states that the delay in filing this application was due to the defendant *"awaiting the file search"*. *"After conducting the file search (she) subsequently informed (her) client on 25<sup>th</sup> July 2019 (and) thereafter obtained instructions to proceed"* with this application.
7. The delay in filing this application has been two and a half months. The unless order was effected on 31<sup>st</sup> May, 2019. In my view, the reasons given for the delay are unacceptable.

8. The next matter for consideration is whether the defendant's grounds are meritorious.
9. On 12<sup>th</sup> April, 2019, the Master quite correctly made an unless Order that unless the defendant files its AVLD by 18<sup>th</sup> April, 2019, the court will deem that they have no documents to file and rely upon. On 9<sup>th</sup> May, 2019, the plaintiff's solicitor informed the Master that draft PTC minutes were sent on 6<sup>th</sup> May, 2019 to the defendant's counsel, as admitted by Vandhana Kirti. A final adjournment was given for parties to convene PTC and file minutes on or before 17<sup>th</sup> May, 2019.
10. In my view, Courts are required to make unless orders against parties who repeatedly fail to comply with Orders of Court.
11. As Moore-Bick LJ stated in *Marcan Shipping (London) Ltd v Kefalas*, [2007] 3 All ER 365 at pgs 372-378:

*The court's power under r3.1(3)(b) to impose sanctions for the failure to comply with an order is but one of a wide range of powers designed to ensure that proceedings are conducted efficiently not only in the interests of the parties themselves, but also in the wider interests of the administration of justice and the furtherance of the overriding objective...*

*..before 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'. (footnotes omitted)*

12. In the present case, the question is whether the order striking out the defence is correct. The defendant filed statement of defence, The plaintiff filed its reply.
13. In my view, the striking out of the statement of defence by the Master for failure to attend the PTC was not appropriate. The matter could have proceeded to trial on the pleadings filed.
14. In *Rafiq v Manubhai & Co. Ltd*, [2016] FJHC 288; HBC10.2004 (21 April 2016) it was held that striking out the defendant's statement of defence pursuant to an unless order without a trial as to merits of the case was incorrect. The unless order was defective and bad in law.
15. The plaintiff has filed summons for judgment to be entered against the defendant for a sum of \$59,091.08 and general damages to be assessed under Or 32. In effect, the plaintiff has invoked Or 19, r 2, which provides that an interlocutory judgment may be entered against a defendant in a claim for a liquidated amount.
16. The statement of claim claims a sum of \$59,091.08, as special damages for loss and damages to its vehicles caused by reason of the negligence and/or breach of the statutory duties of the defendant.
17. In my view, the plaintiff has to establish his claim of \$59,091.08. It is not a liquidated sum.
18. Mr Nandan, counsel for the defendant cited the judgment of the Court of Appeal in *Subhodh Kumar Mishra v Car Rentals (Pacific) Ltd* (1985) 31 FLR 49 which cited *Knight v Abbott*, (1882) 10 Q.B. 11 as follows:

*A liquidated demand is in the nature of a debt i.e. a specific sum of money due and payable under a contract. Its amount must be ascertained or ascertainable as a mere matter of arithmetic...all matters.. have to be proved before a judgment can go.*
19. In my view, there will be no prejudice caused to the plaintiff if this application is allowed .  
The plaintiff has not opposed this application.
20. In all the circumstances, I exercise my discretion in allowing the summons.

21. Sir Wilfred Greene, MR in *Gatti v Shoosmith* (1939) 3 All ER 916 at pg 919 stated.;

*..the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion.*

22. The application for extension of time to leave to appeal the decision of the Master is allowed.

23. **Orders**

- a. The summons for extension of time to leave to appeal the decision of the Master striking out the statement of defence is granted.
- b. I make order staying the proceedings in this case, until determination of the application for leave to appeal.
- c. I make no order as to costs.



*A.L.B. Brito-Mutunayagam*

A.L.B. Brito-Mutunayagam  
JUDGE  
21<sup>st</sup> November, 2019  
At Suva