

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 262 of 2023

BETWEEN: **GAYLORD WALTER BUCK THAGGARD** of 19 Wau Lane, Lautoka, Pilot.

PLAINTIFF

A N D: **MEREWALESI THAGGARD** of Kavika Place, Domain, Suva.

FIRST DEFENDANT

A N D: **WHITE STORK** a Company registered under the Laws of Fiji.

SECOND DEFENDANT

A N D: **ADRIANA THAGGARD-BOSSLEY** of Sterling Place, Lami, Facilities Manager.

THIRD DEFENDANT

A N D: **MALCOLM BOSSLEY** of Sterling Place, Lami, Pacific Senior Adviser.

FOURTH DEFENDANT

A N D: **DAVID STUART McRAE** of Kavika Place, Domain, Suva, Purported Director of
White Stork, a company registered under the Laws of Fiji.

FIFTH DEFENDANT

A N D: **PETER KNIGHT** of Suva, Legal Practitioner.

SIXTH DEFENDANT

Appearances: Ms. Draunidalo T. with Mr. D. S. Naidu for the Plaintiff
 Mr. M. Naivalu for the first and second Defendants
 Mr. M. Naivalu for the third, fourth and fifth Defendants on instructions of Haniff Tuitoga
 Mr. S. Krishna on instructions of Munro Leys for the sixth Defendants

Date of Hearing: 27 May 2024

Date of Ruling: 27 May 2024

R U L I N G

1. There is a civil contempt proceedings on foot in this Court under Order 52 of the High Court Rules 1988.

2. The proceedings in question relate to the defendants alleged failure to comply with certain interlocutory orders granted by this Court on 29 December 2023.
3. Messrs. Law Naivalu raises a preliminary point.
4. He argues that leave has lapsed.
5. Order 52 Rule 3 of HCR provides:
 3. – (1) When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion and, unless the Court granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.
 - (2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.
 - (3) Subject to paragraph (4), the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2, must be served personally on the person sought to be committed.
6. Leave in this case was granted on 15 February 2024.
7. Applying Order 52 Rule 3 (2), leave would lapse after fourteen days from 15 February 2024. Mr. Naivalu argues that the fourteen days lapses on 28 February 2024. He counts from 15 February.
8. Ms. Draunidalo argues that leave lapses on 29 February 2024. She counts from 16 February.
9. Whether leave had lapsed on 28 or 29 February 2024, the fact of the matter is that the plaintiff’s counsel only asked for an extension on 06 March 2024. Mr. Naivalu argues that by that time, leave had long lapsed (regardless of whether 28 or 29 February is taken as the lapsing point).
10. Both counsel rely on **Naidu v Naicker** [2017] FJHC 94; HBM14.2016 (10 February 2017)
11. Mr. Naivalu relies on the following passage:

[28] I agree with Balapatabendi J. His conclusions are consistent with the language of the High Court Rules in particular Order 52, Rule 3 (2).

[29] For the above reasons, I would conclude that the applicants had failed to enter their notice of motion for committal for hearing within 14 days after the leave to issue committal proceedings against the respondents as required in Order 52, Rule 3 (2). The leave was granted to the applicants on 24 August 2016. They

should have entered the application for hearing within 14 days of the granting of the leave, i.e. on or before 6 September 2016. Instead, they entered their application for hearing on 19 September 2016, which is clearly 26 days after the leave was granted. The requirement that the notice of motion for committal shall be entered for hearing within 14 days after such leave was granted is mandatory and must be strictly complied with as the liberty of the person is at stake in this situation. The filing of the motion within 14 days after the leave was granted is not sufficient compliance with Rule 3 (2). The mover must obtain a date and enter the motion for hearing within 14 days after granting such leave.

12. Ms. Draunidalo relies on the following:

[30] Mr. Narayan submits that even if leave had lapsed the court has powers under Order 3 Rules 4 (1) and (2) of the HCR and under the inherent jurisdiction to extend the time for compliance has expired.

[31] Rule 4 runs:

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[32] The court has the power to extend or abridge any time limit within which a person is required by the HCR or by any judgment, order or direction, to do any act in any proceedings. This is a discretionary power, which should be exercised in appropriate cases.

[33] Hong Kong Court of appeal in *Effiscient Ltd v Edward Eugene Lehman* [2012] HKCFI 927; [2012] 3 HKRD 671; HCMP 593/2012 (14 June 2012) confirmed a decision made by the High Court granting leave to Effiscient to issue and serve a Notice of Appointment to hear the originating summons in contempt proceedings out of time within 7 days of his order. The High Court made the decision in an application for extension of time to issue and serve the originating summons out of time. Hong Kong High Court Rules, O.52 rule 3 (2) (similar to ours) provides that: “*Unless within 14 days after such leave was granted the originating summons is entered for hearing the leave shall expire.*”

[34] Reliance is placed upon the above case by the applicants. At para 25 the Hong High Court said:

"25. I am satisfied that the judge has power to extend time in this situation and there is no basis for the appeal court to interfere with the exercise of his discretion to extend time. No delay has been caused to the progress of the proceedings, as noted by the judge. Mr. Allman-Brown has accepted at the hearing on 24 February that no prejudice has been occasioned as a result of the extension of time. He also accepted before us that Mr. Lehman had constructive knowledge through his solicitors of the irregularity that a Notice of Appointment was not issued within time when he took various steps in the proceedings between 15 December 2011 and 8 February 2012. Under Order 2 rule 2, proceedings will not be set aside for irregularity unless an application to do so is made within reasonable time, and before the applicant has taken any fresh steps after becoming aware of the irregularity. Constructive knowledge in this situation could constitute waiver of the

irregularity (Fabrique Ebel Societe Anonyme, supra at 171 E and H). Last but not least, the judge would have granted fresh leave to commence proceedings if this were required. His exercise of discretion to grant leave to issue a Notice of Appointment out of time is plainly correct. '

failure to issue a Notice of Appointment within time was an oversight. ”

[35] There is no application made by the applicants to serve and enter the notice of motion for committal out of time. Mr. Narayan advances argument that the court may deem that an application has been filed and grant the extension of time in this situation. There is no explanation for the delay. The failure to enter the motion within 14 days after granting leave to issue committal proceedings was not an oversight. Moreover, the applicants deliberately obtained the date for hearing knowing very well that the date was outside the time limit prescribed by O.52, r. 3 (2), albeit the court, was ready and willing to give a date for hearing within the time limit. Having obtained a convenient date for hearing, the applicants are not entitled to complain, after the objection was raised by the respondents, that it was the Court that had allocated the date. In the circumstances, I decline to grant extension of time to serve and hear the notice of motion for committal. A deliberate omission of an act required to be done under the High Court Rules cannot be cured by invoking O.2, r.1 of the HCR, which provides:

“1.-(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.”

[36] In a situation where the leave granted to issue committal proceedings has lapsed, the applicant might either file an application for fresh leave or apply for extension of time. The new leave can replace that has lapsed.

[37] In any event, if it were necessary for the applicants to make a new application for leave to issue contempt proceedings, I would not have granted fresh leave. This is because it has now been brought to my notice that the contempt proceedings are envisaged for an alleged breach of a term of the consent judgment, which in fact does not form part of the consent judgment.

13. It appears from the above passage that the Ajmeer J had accepted that the Court has a discretion under Order 3 Rule 4 (1) and (2) to extend leave where leave has already lapsed. However, he refused to extend leave because there was no application made by the applicant to enter the notice of motion for committal out of time.
14. In this case, following the granting of leave on 15 of February 2024, the plaintiff then filed a Notice of Motion for an Order for Committal on 19 February 2024. There is no issue about the filing of the Motion.

15. The issue however is on the returnable of 29 February 2024 entered on the Motion by the Registry. I did not sit on the 29 February 2024 as I had travelled to Suva on 28 February 2024 for a meeting of the Civil Rules Committee.
16. It appears that if Mr. Naivalu's argument is correct, that is, that leave had lapsed on 28 February, then the fault is on the Registry for setting the 29 February as the returnable date for the Motion. In any event, counsel for the plaintiff should have been alert on this point. Ms. Draunidalo ought to have urged the Registry on 29 February 2024 to have the application urgently placed before Mackie J or another Judge. By her calculation, 29 February was the date when the fourteen days would run out. Had such an application been made on 29 February to place the matter before a Judge and seek an extension of time, the Court might have readily exercised its discretion to extend time, even if the leave had expired a day earlier on 28 February as Mr. Naivalu argues.
17. In this case, the matter was called on 06 March 2024 when Mr. Naidu appeared and sought an extension orally in Court. I believe the Clerks would have sent NOAH to Mr. Naidu. I did extend the leave on that occasion.
18. Should I set aside that leave? I have a discretion as to whether or not to set aside.
19. Because the Registry had contributed to the oversight, this Court should step in to preserve the integrity of the processes which the plaintiff has set in motion in execution of the Order which he has obtained from this court.
20. The principle of *nunc pro tunc* ("an act done retrospectively so as not to prejudice a party- what should have been done then could be done now by court") – with all the necessary time adjustments (**Southwick v State** [1997] FJCA 5; Aau0020u.96s (14 February 1997), gives some perspective. However, in this case, rather than adjust time, I simply exercise my discretion to stand by the leave already granted – albeit orally.
21. Mr. Tuitoga submits that the proceedings should be struck out because they were not served personally on the 3rd and 4th defendant. This is not disputed by Ms. Draunidalo.
22. So – against the third and fourth defendants, the Order 52 proceedings are struck out.

ORDERS

1. Messrs Law Naivalu's application to set aside the leave granted to the Plaintiff to file committal proceedings is dismissed. No order as to costs.
2. Mr. Hannif Tuitoga's application to dismiss the committal proceedings application on account of the fact that the process was not served personally on the 3rd and 4th defendants is granted. Costs to the 3rd and 4th defendants which I summarily assess at \$1,000 each.



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Anare Tuilevuka
JUDGE

27 May 2024