IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 344 of 2017

BETWEEN: **SEAN GRIFFITHS** t/a **SHADOWS WELDING & TRAILER REPAIRS** c/- O' Driscoll & Co, Suite 2, Floor 1, 22 Carnarvon Street, Suva.

PLAINTIFF

A N D: **MAKERETA NARAKI** of Korolevu (P. O. Box 37), Businesswoman.

DEFENDANT

A N D:

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 51 of 2018

BETWEEN: **MAKERETA SAUKILAGI** of Nawamagi Village, Sigatoka.

PLAINTIFF

A N D: **SEAN GRIFFITHS** of Beach House Backpackers Accommodation, Colova, Sigatoka.

DEFENDANT

Appearances : Mr. O'Driscoll for the Plaintiff in HBC 344/17 and Defendant in HBC 51/18
Mr. Dass E. for the Defendant in HBC 344/17 and for the Plaintiff in HBC 51 of 2018

Date of Hearing : 05 August 2024

Date of Ruling : 24 April 2025

R U L I N G

INTRODUCTION

1. At the outset, I need to point out that I am dealing with two inter-related files, namely HBC 344 of 2017 and HBC 51 of 2018. These files were, by consent, consolidated on 23 June 2020.

2. The parties, Mr. Sean Robert Griffiths (**"Sean"**) and Ms. Makereta Naraki (**"Makereta"**), are involved in both proceedings. However, their roles are reversed. Sean, who is the plaintiff in

the 2017 action, is the defendant in the 2018 case. Makereta, who is the defendant in the 2018 action, is the plaintiff in the 2018 case.

3. At the heart of their dispute, is a motor vessel. This vessel is registered in the Register of Fiji Ships (**"Register"**) in Makereta's name. According to the Statement of Claim, Sean had arranged to have the vessel built in Fiji. The vessel was actually built between 2015 and 2016. It cost Sean $90,245-62 to build the boat.

APPEAL

4. What is before me now is an appeal from a decision of the Learned Master. The decision in question was handed down on 25 January 2024 where the Master had granted orders in terms of an interlocutory summons which Sean had filed on **04 September 2023**. Below, I paraphrase the orders in question:

   (i) Makereta's statement of defence in the 2017 action was dismissed on account of her failure to comply with directions on the filing of her List of Documents.

   (ii) costs to Sean in the 2017 action which is assessed at $2,500 – 00.

   (iii) Makereta's 2018 action was struck out on account of her failure to file and serve a List of Documents and Affidavit Verifying List of Documents.

   (iv) Sean and/or his company, Driveaway (Fiji) Limited were declared the true owners of the vessel.

BACKGROUND

5. Sean and Makereta were family friends for some twenty-five (25) years or so. Sean lives in Australia. Once upon a time, when they were still on such good and friendly terms, Sean would lodge at Makereta's family house along the Coral Coast whenever he visited Fiji.

6. After Sean had the boat built, he and Makereta entered into an arrangement. The arrangement was to have the vessel registered in Makereta's name here in Fiji.

7. It appears to be common ground that Sean was to remain the beneficial owner of the boat. I say this based on Makereta's claim that she and Sean had also agreed that she would pay Sean for the boat. According to her, this was to be done by part-payments to Sean whenever he visited Fiji. This means that Makereta was to hold the boat on trust for Sean.

8. At some point, Sean asked Makereta to hand over the vessel to him. Makereta refused. Sean then instituted the 2017 proceedings.

9. At the hearing before me on 05 August 2024, Mr. Dass, who appeared for Makereta, conceded that Sean had "purchased" the vessel and that the vessel was to be *"under the name of my client"*. Mr. Dass also conceded that Sean and Makereta did enter into an arrangement. According to Mr. Dass, the arrangement allowed Makereta to pay Sean for the vessel by part-payments. The payments was to be made to Sean only when he was in Fiji.

10. Mr. Dass goes on to say that Makereta has in fact paid Sean in full for the vessel.

PROCEDURAL HISTORY

11. Notably, on **22 September 2022**, the Master granted two interlocutory orders. The first one directed Makereta to deliver the motor vessel "Adi Lisa" to Sean. The second one restrained Sean from selling, mortgaging or alienating the vessel until determination of the substantive matter.

12. The Summons for Directions was filed by Sean on 23 September 2022. **Orders in Terms were granted on 26 October 2022**.

13. On 01 December 2022, Janend Sharma Lawyers, filed a Summons for Leave to Withdraw as Makereta's counsel. The firm had been acting for Makereta since 04 September 2018 when it filed the Notice of Intention to Defend. Leave was granted by the Master on **23 March 2023**.

14. This was the second such application by Janend Sharma Lawyers. The first application was filed on 15 January 2020.

15. Sean filed his List of Documents on **16 May 2023**. A little less than four months later, O'Driscoll & Company filed the Summons upon which the Learned Master would then grant the Orders in Terms which are the subject of this appeal.

16. There is an Affidavit of Service of one Ms. Prashika Chand sworn on 16 May 2023. Chand deposes that she did, on 10 May 2023, personally serve Makereta in Nadi Town, a true copy of the sealed Orders of the Master dated 23 March 2023. Makereta did acknowledge service by signing on a duplicate, a copy of which is annexed to the affidavit of service.

GROUNDS OF APPEAL

17. Below is my digested version of the poorly drafted grounds of appeal filed by Makereta:

(i) there was enough material already filed by Makereta and which is in the relevant Court file which shows she has a meritorious opposition. The Master totally disregarded all this in refusing her application for extension of time to pay late filing fees for her proposed aaffidavit in opposition to Sean's aaffidavit of 04 September 2023. In refusing that, the Master erred in law and procedure.

(ii) judgment on an unliquidated claim can only be entered after a full trial or a formal-proof hearing. Sean's claim is claim is not for a liquidated sum. The Master erred in law when he granted Order in terms of Sean's Summons filed on 04 September, 2023 without taking into account that his claim was for an unliquidated sum.

(iii) Makereta's previous solicitor, Messrs. Janend Sharma, had been withholding her file on a lien. The Master had been informed of this by Makereta's new counsel on some previous court appearances. The Master erred when he failed to consider this as the main factor behind Makereta's delay in filing the affidavit in oopposition.

(iv) the Master appeared to have formed the view that this was an old matter. He then gave undue weight to this factor. In doing so, he failed to consider the prejudicial effect on Makereta of the striking out her statement of defence in the 2017 matter and also the striking out of her claim in the 2018 case. The Master erred in law and in fact by taking this approach.

(v) the Master erred in law by granting Order in Terms of the summons filed on 04 September, 2023 without first calculating the exorbitant amount of costs in the sum of $11,000.00 (eleven thousand dollars) that was prayed for in Sean's summons.

(vi) the boat MV Adi Lisa is registered with the Maritime Safety Authority Fiji in Makereta's name. In terms of section 75 of the Ships Registration Act 2013, Sean can only succeed in changing ownership of the boat if he can show good cause. The Master erred when he failed to direct his mind to section 75.

(vii) Makereta's delay was not intentional or contumelious. The Master erred in law and in fact when he failed to take this into account when he struck out Makereta's 2018 claim and 2017 sstatement of defence for want of prosecution.

(viii) the Master erred in law when he relied on Order 25 Rule 9 (want of prosecution) in entering judgment for Sean. A striking out for want of prosecution is made only on a claim where the plaintiff has failed to move his case forward.

(ix) the Master erred in fact and in law when he granted order in terms of Sean's Summons filed on 04 September, 2023 when there was no evidence that granting an extension to Makereta would cause a substantial risk that a fair trial would not be possible.

(x) the Master erred in procedure when he refused Makereta's application to pay the late filing fees on the same day despite being fully aware that no hearing date had been assigned early and hence no prejudice to Sean rather plaintiff could have been granted time to file reply and matter ought to have proceeded to hearing on the summons filed on 04 September, 2023.

SUBMISSIONS

18. O'Driscoll & Company has not filed any written submissions. I have read the submissions filed by Chetty Law & Associates. Below, I summarise the points highlighted:

(i) the power to strike out a pleading is a discretionary one (**Birkett v James** [1985] 3 All ER 801; **Trade Air Engineering (West) Limited and Ors v Laisa Taga & Ors** (unreported Civil Appeal No. 62 of 2006 delivered 09 March 2007)

(ii) before exercising the discretion, the court must ascertain:

(a) that there has been an inordinate delay; and
(b) that, because of the delay, there is a substantial risk that it will not be possible to have a fair trial, or, that it is likely to cause prejudice to the defendant

(iii) there was no inordinate/inexcusable delay in this case. Makereta engaged Chetty Law after she was served with the 04 September 2023 Summons. The Summons was called before the Master on 09 October 2023. On that occasion, counsel informed the Master that Makereta's documents were all with Janend Sharma Lawyers. Counsel also sought time to obtain the documents. The matter was then adjourned. Notably, the parties were also exploring settlement which did not happen because O'Driscoll had rejected Chetty's offer of 07 November 2023.

(iv) Chetty Law had difficulty at first filing an affidavit in opposition because the client's files were with Janend Sharma Lawyers who was exercising a solicitor's lien over the files.

(v) in spite of that, Chetty Law still managed to get an affidavit in opposition together. However, they could not file this as the Registry would not accept it as it was late.

(vi) on 25 January 2024, in Court, counsel sought leave to file the affidavit in opposition and pay late filing fee. This was refused by the Master who then proceeded to grant Orders in Terms.

(vii) the boat was a source of livelihood for Makereta. She runs a fishing business. The Orders are prejudicial to her.

(viii) in any event, this matter was ready for trial when the above Orders were granted.

19. The Learned Master (and the High Court) has powers under Order 24 Rule 16 (1) and (2) to impose a range of sanctions on a party who fails to comply with any discovery or production orders.

COMMENTS

20. The Learned Master (and the High Court) has powers under Order 24 Rule 16 (1) and (2) to impose a range of sanctions on a party who fails to comply with any discovery or production orders.

21. The sanctions available to the Court include:

(i) the dismissal of an action (if it is the plaintiff who is in default) (as per Order 24 Rule 16 (1)(b));
(ii) the striking out of a defence and the entry of judgement (if it is the defendant who is in default - as per Order 24 Rule 16 (1)(b)); or
(iii) a committal (as per Order 16 Rule (2))

22. However, the Fiji Court of Appeal in **Bhawis Pratap v Christian Mission Fellowship** [2006] ABU 93/05 14 July 2006 has said that to deprive a defendant of the right to defend is a serious step only to be taken in the clearest of cases.

23. While the power to strike out a defence is available, the question in each case is – whether this is such:

> "a clear case" where "the Appellant's conduct … was sufficiently unsatisfactory to warrant the Appellant being deprived of its right to defend"

(see **Native Land Trust Board v Rapchand Holdings Ltd** [2006] FJCA 61; ABU0041J.2005 (10 November 2006).

WAS THE CONDUCT OF THE APPELLANT SUFFICIENTLY UNSATISFACTORY AS TO WARRANT IT BEING DEPRIVED OF ITS RIGHT TO DEFEND?

24. Makereta had failed to file her List of Documents on time. In terms of proportionality, perhaps the striking out of the defence was a little on the excessive side in the circumstances, at least when compared to the situation in **Rapchand** (supra). Perhaps the same Orders granted by the Master would be more palatable if it had been made following a non-compliance with an unless Order (see discussion in **Bhawis Pratap** (supra).

25. I do note that Sean himself had delayed in filing his List of Documents by some seven months or so. I also note that he filed the Summons in question some four months after he had filed his List.

26. The approach taken by the Learned Master is understandable. However, if, and until the rules are changed, the philosophy which underpins the reasoning in **Bhawis Pratap** (supra) and in **Rapchand** (supra), upon which the existing rules are premised, will prevail.

27. In **Raji v Permanent Secretary of Health** [2023] FJCA 202; ABU0031.2020 (29 September 2023), the Fiji Court of Appeal was dealing with an appeal of a decision of the High Court which had refused the plaintiff's application for an adjournment and had dismissed the action as a result. The Fiji Court of Appeal said as follows:

> [6] I extract those principles classifying them as (a) The Broad Principle; and (b) Counter-principles,
>
> (a). The Broad Principle
>
> Although an Appellate Court should be slow to interfere with the exercise of discretion of a trial judge to refuse an adjournment it will do so if the refusal will result in a denial of justice to the applicant (vide: **Maxwell v. Keun** [1928] 1 KB 645.
>
> (b). The Counter-principles -
>
> (i). Need for Case Management
>
> That counter, visiting the Commonwealth jurisprudence, could reasonably be said to have come after more than six decades when the concept of case management came about (vide: **Sali v. SPC Limited** [1993] HCA 47; [1993] 67 ALJR 841.
>
> (ii). Ancillary consideration to (a) above
>
> That is, the consideration of not merely the parties to a particular suit but the other listed cases that due to the granting of an adjournment could result in delay, even if the parties in litigation in a particular case consent to an adjournment. (vide: **State Pollution Control Commission v. Australian Iron and Steel Pty Ltd.** [1992] 29 NSWLR 487 at 493 – 494).
>
> The Resulting (Pre-dominant) criterion emerging from those principles
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> [7] As was stated in the case of **State of Queensland v. I L Holdings Pty Ltd.** [1997] HCA 1; [1997] 189 CLR 146,
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> *"Case management is not an end in itself. It is an important and useful aid for ensuing the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of the Court is the attainment of justice and no principle of case management can be allowed to supplant that aim."*
>
> Reflections based on the Principles emanating from the above discussion
>
> [8] Based on the aforesaid principles in their application to the instant case, I was unable to find a rationale, which could be regarded as proper and reasonable for the learned judge to have refused an adjournment of the trial date resulting in a dismissal of the plaintiff's action.

[9] The learned judge evidently had laid emphasis on the requirement of time management in judicial proceedings.

Justice delayed is justice denied but justice hurried is also justice denied

[10] Consequently, it is a balancing exercise a Court is required to perform. From a **"legal-philosophical" perspective**, Courts in search of justice find the means to accomplish that search in the law in striking that essential balance for as it is often said "justice must be done according to law." It is that law which one finds in the established legal principles in the statute book as judicially interpreted taken in the circumstances of a given case. The relevant principles in their application in the circumstances of the instant case were recounted in the foregoing discussion.

[11] Although it could be said that whether to grant or refuse an adjournment of a trial date is a matter of exercise of discretion for the Court, that discretion is not absolute. It is one that must be exercised judicially. How that discretion is to be exercised must necessarily be in the light of established legal principles as articulated above.

28. In this case, it is common ground that Keith did pay for the construction of the vessel in question. It is also common ground that the parties did enter into an arrangement. The exact terms of that arrangement is what is at issue between the parties. It is common ground also that Makereta was allowed to keep the boat for some time. According to her, she used the boat for her commercial fishing. It appears that whatever arrangement they had was not recorded in writing. Mr. Dass submits that this is a triable issue.

ORDERS

29. The Orders are:

(i) the appeal is granted on the condition that the Masters interlocutory Orders of 22 September 2022 (see paragraph 7 above) are hereby reinstated. This means that Sean shall remain in possession of the boat on the condition that he is not to dispose of it or transfer it or encumber it in the terms stated in the order.

(ii) costs in favour of the appellant which I summarily assess at one thousand dollars only ($1,000 – 00).

30. This consolidated action is now adjourned to the Learned Master for mention on 24 April 2025 for mention.

Anare Tuilevuka
JUDGE

24 April 2025